A MATTER OF PRECEDENT: ARE ALL QUESTIONS OF FIRST NATIONS SOVEREIGNTY REALLY NON-JUSTICIABLE IN AUSTRALIAN COURTS?

OLIVIA BARR*

For several decades, the High Court of Australia has consistently repeated that all questions concerning First Nations sovereignty are non-justiciable in Australian courts. Not surprisingly, it is widely assumed that this position is incontestable as a matter of precedent. This article calls this assumption into question by exploring the precedential value of the Court's position, including retracing the under recognised origins in their 1979 decision of Coe v Commonwealth ('Coe'), which remains the Court's only appellate decision directly on this point. Closely examining Coe through the lens of precedential value offers important insights, namely: that an evenly divided Court encountered a complex set of substantive issues in an interlocutory context, based its decision on technical issues of procedure, and delivered limited reasoning on underlying substantive issues. Re-evaluating Coe's precedential value thus raises significant questions about the doctrinal stability and durability of the Court's current position that all questions of First Nations sovereignty are non-justiciable.

I INTRODUCTION

This article tells a simple story about precedent. For several decades, the High Court of Australia has consistently repeated that all questions concerning Aboriginal and Torres Strait Islander sovereignty are non-justiciable in Australian courts.[1] Not surprisingly, it is widely assumed that this position is incontestable

* Associate Professor, Melbourne Law School. Email: olivia.barr@unimelb.edu.au. This article was written on Wurundjeri Country. I am grateful to all who provided feedback on this article in its various stages of development, including Adrienne Stone and Lael K Weis for their helpful comments, conference attendees at the Australian Institute of Aboriginal and Torres Strait Island Studies Summit 2023 held on Whadjuk Noongar Boodja, Anton D'Amico and Fiona Xia for their research assistance, and the anonymous reviewers.

1 See *Coe v Commonwealth* (1979) 53 ALJR 403 ('*Coe*'); *Coe v Commonwealth* (1993) 68 ALJR 110 ('*Coe (on behalf of the Wiradjuri)*'); *Walker v New South Wales* (1994) 182 CLR 45 ('*Walker*'); *Thorpe v Commonwealth [No 3]* (1997) 71 ALJR 767 ('*Thorpe*'). See also *Wacando v Commonwealth* (1981) 148 CLR 1 ('*Wacando*'); *Mabo v Queensland [No 2]* (1992) 175 CLR 1 ('*Mabo*'); *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 ('*Yorta Yorta*'); *Love v Commonwealth* (2020) 270 CLR 152 ('*Love*').

as a *matter of precedent*, and that as a consequence, fundamental questions about the history and future of legal relations in Australia cannot be adjudicated.[2] And yet, as this article will demonstrate, there are good reasons to question this widely accepted assumption.[3]

This article makes an important and timely contribution to existing scholarship by critically examining the precedential value of the High Court's position: namely, by retracing the under recognised origins of this assumption in their 1979 decision of *Coe v Commonwealth* ('*Coe*').[4] Significantly, this case continues to be the only appellate decision by the High Court directly on this point. Closely examining *Coe* through the lens of precedential value offers three important insights. First, that in this case an evenly divided court encountered a complex set of substantive issues in an interlocutory, pre-trial context. Second, that the Court's decision was based on technical issues of procedure, and third, that judicial reasoning on underlying substantive issues was limited. Re-evaluating the precedential value of *Coe* raises significant questions about the doctrinal weight, stability, and durability of the High Court's current position that all questions of First Nations sovereignty are non-justiciable.

While issues of sovereignty and justiciability provide underlying context for this article's central argument about precedent, I focus on the leading case of *Coe* to examine how it measures up against basic principles and protocols of *stare decisis*. By focusing exclusively on matters of precedent, and intentionally decentring the underlying substantive questions, I demonstrate how the High Court has not properly considered questions of First Nations sovereignty at any point in our legal history as a matter of precedent.[5] This article's central argument is that current

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2 This is the situation for both courts and academic commentary: see, eg, Margaret Beazley, 'Aboriginal Australians and the Common Law' (2021) 95(8) *Australian Law Journal* 609, 622; Peter Grose, 'The Indigenous Sovereignty Question and the Australian Response' (1996) 3(1) *Australian Journal of Human Rights* 40, 43 <https://doi.org/10.1080/1323238X.1996.11910966>; Shireen Morris, '*Love* in the High Court: Implications for Indigenous Constitutional Recognition' (2021) 49(3) *Federal Law Review* 410 <https://doi.org/10.1177/0067205X211016584>; Sean Brennan and Megan Davis, 'First Peoples' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 27 <https://doi.org/10.1093/law/9780198738435.003.0002>; Dylan Lino, 'Why a First Nations Voice Will Not Extinguish Indigenous Sovereignty' (2023) 34(2) *Public Law Review* 95, 97–8; David Ritter, 'The "Rejection of Terra Nullius" in *Mabo*: A Critical Analysis' (1996) 18(1) *Sydney Law Review* 5, 19.

3 The use of appropriate terminology with respect to Aboriginal and Torres Strait Islander peoples is important, especially given the legacy of research undertaken by non-Indigenous researchers which has not done this. As a non-Indigenous woman who grew up on Whadjuk Noongar Boodjar and now lives on Wurundjeri Country in Naarm, I use pluralising terminology in this article to recognise and emphasise the diversity of Aboriginal and Torres Strait Islander peoples and nations. As a result, I refer to Aboriginal and Torres Strait Islander peoples, nations, First Nations, or First Peoples in the plural, as well as sovereignties, where appropriate. Where possible, I identify the relevant First Nation, such as the Wiradjuri Nation or Bundjalung Nation. I use the more limiting, homogenising language of 'Aboriginal' and 'sovereignty' when engaging with prior case law to reflect the judicial language of the time, which has predominantly arisen when Aboriginal – not Torres Strait Islander – litigants have raised issues of sovereignty in the singular, rather than sovereignties in the plural, before the High Court.

4 *Coe* (n 1).

5 While this article focuses specifically on *stare decisis*, for research more squarely focused on questions of First Nations sovereignty, see especially Marcelle Burns, 'First Nations and State Sovereignties in

interpretations which might reasonably assume that *Coe* carries precedential value about questions of First Nations sovereignty are unsettled by a careful application of *stare decisis*. This argument has implications for an assessment of whether the Court's current position has been properly appraised, and in doing so, opens up new legal options previously thought to be unavailable.

My analysis adopts the following structure. I begin in Part II by acknowledging the underlying terminology of non-justiciability and sovereignty. I then proceed in Part III to introduce the key cases that form the basis of the High Court's current position in order to identify the prevalent assumption that all questions of First Nations sovereignty are non-justiciable, which I argue is based on *Coe*. In Part IV, I closely examine *Coe*, finding it was a poorly reasoned decision delivered in an interlocutory, pre-trial context that was heavily influenced by its procedural context, with the result that judicial reasoning on substantive issues such as sovereignty was necessarily limited. It was also decided by an evenly divided High Court. I then proceed in Part V by addressing the general problem of evenly divided courts to clarify their status as judgments that do not create binding legal authority under the doctrine of precedent. Applying this to *Coe*, I argue there has been an error in the application of the doctrine of precedent because, properly understood, *Coe* generates no binding authority. As the only appellate decision on this point, this raises significant questions about the precedential status of the current High Court position. I conclude in Part VI with some preliminary comments about potential consequences.

II TERMINOLOGY

Underlying the High Court's current position that all questions of First Nations sovereignty are non-justiciable is the terminology of non-justiciability and sovereignty. Both terms have conceptually porous boundaries. This complicates an analysis of the Court's current position as a matter of precedent. Before outlining the cases that establish this position in the next Part of this article, it is helpful in this Part to first acknowledge this underlying terminology in order to reduce the risk of misunderstanding the precedential parameters of the Court's position.[6]

Australia: Challenges for Enduring Courts in Changing Times' (2024) 98(5) *Australian Law Journal* 362; James Aird and Allan Ardill, 'A "Kind of Sovereignty": Toward a Framework for the Recognition of First Nations Sovereignties at Common Law' (2023) 46(2) *Melbourne University Law Review* 330; Peter Kilduff and Asmi Wood, 'Determining Sovereignty: Through Law? Or a Political Option?' (2021) 50(3) *Australian Bar Review* 476; Daniel Lavery, 'Renovating the Orthodox Theory of Australian Territorial Sovereignty' (2022) 45(2) *University of New South Wales Law Journal* 499 <https://doi.org/10.53637/WDEI5411>; Beth McKenna and Ben Wardle, 'Usurping Indigenous Sovereignty through Everchanging Legal Fictions' (2019) 28(1) *Griffith Law Review* 37 <https://doi.org/10.1080/10383441.2019.1682959>; Linda Popic, 'Sovereignty in Law: The Justiciability of Indigenous Sovereignty in Australia, the United States and Canada' (2005) 4 (Fall) *Indigenous Law Journal* 117. See generally Paul McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford University Press, 2004) <https://doi.org/10.1093/acprof:oso/9780198252481.001.0001>.

6 *Thomas v Mowbray* (2007) 233 CLR 307, 354 (Gummow and Crennan JJ, Gleeson CJ agreeing at 324 [6], Callinan J agreeing at 511 [609]) ('*Thomas*').

A Non-justiciability

On the one hand, non-justiciable issues are simply those incapable of being settled by a court.[7] On the other hand, non-justiciability has been described by the High Court as a 'slippery term of indeterminate reference'.[8] Relevant to the analysis in this article, which focuses on the Court's non-justiciable position on questions of First Nations sovereignty as a matter of precedent, part of this slipperiness is that this term may describe the Court's lack of 'constitutional competence' to intervene, or a scenario where a party has standing but there is no 'matter' before the Court due to the political nature of the question.[9] For reasons such as these, the Court has recognised there are 'fundamental and difficult issues' which are wrapped up in the term 'non-justiciable' and its 'cognate expressions'.[10] Those difficult issues are compounded in cases, such as those addressing questions of First Nations sovereignty, where the technical language of non-justiciability is largely absent and instead the term 'non-justiciable' is used as a 'conclusory label'.[11] As Jeremy Kirk astutely observes, rather than developing and applying the relevant criteria, such as the 'political questions' test, at times non-justiciability is used as a 'label … applied to conclusions that some claim or argument should be rejected or cannot be resolved by exercise of judicial power'.[12] In the context of such an imprecise term, using it as a conclusory label risks generating further confusion.[13]

B Sovereignty

Likewise, there is a tendency to 'take for granted what sovereignty means' even though sovereignty is a complex, contested, and elusive term.[14] Often sovereignty

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7 *LexisNexis Concise Australian Legal Dictionary* (5th ed, 2015) 'justiciability'. See generally Jeremy Kirk, 'Justiciability' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 510.

8 *Thomas* (n 6) 354 [105] (Gummow and Crennan JJ, Gleeson CJ agreeing at 324 [6], Callinan J agreeing at 511 [609]).

9 Ibid 354 [105]–[106], citing *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 370 (Gummow J).

10 *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 555 [92] (Gaudron, McHugh and Gummow JJ), referring to the differences in opinion in *Sue v Hill* (1999) 199 CLR 462.

11 Kirk (n 7) 518.

12 Ibid.

13 The concept of 'justiciability' raises additional complexities beyond the scope of the precedential focus of this article. In a constitutional context, see, eg, Jonathan Tjandra, 'Justiciability as a Constitutional Limitation on Federal Jurisdiction' (2024) 52(2) *Federal Law Review* 182 <https://doi.org/10.1177/0067205X241253295>; Brandon Smith, 'Reconceptualising "Justiciability": Crafting a Coherent Framework for Australia's Unique Constitutional Context' (2022) 50(3) *Federal Law Review* 371 <https://doi.org/10.1177/0067205X221107408>. In a context of judicial review, see, eg, Chris Finn, 'The Justiciability of Administrative Decisions: A Redundant Concept?' (2002) 30(2) *Federal Law Review* 239 <https://doi.org/10.1177/0067205X0203000202>; Rayner Thwaites, 'The Changing Landscape of Non-justiciability' [2016] (1) *New Zealand Law Review* 31. In an international context, see, eg, Cameron Sim, 'Non-justiciability in Australian Private International Law: A Lack of "Judicial Restraint"?' (2009) 10(1) *Melbourne Journal of International Law* 102.

14 Joanne Barker, 'For Whom Sovereignty Matters' in Joanne Barker (ed), *Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination* (University of Nebraska Press, 2005) 1, 1 <https://doi.org/10.2307/j.ctt1dnncqc.4>.

is collapsed with territory to refer to the supreme authority of a state, including its independence from other states. But as Sean Brennan, Brenda Gunn, and George Williams describe, at 'its most general, sovereignty is about the power and authority to govern', which does not require a state.[15] Moreover, as First Nations scholars have pointed out, sovereignty is a European concept that is difficult to assimilate with Indigenous legal traditions.[16]

At the same time, First Nations peoples have adopted but also modified this 'European term' to resist colonisation.[17] While continuing to reference power and authority to govern, sovereignty in this sense decentres the state and is often described by Aboriginal and Torres Strait Islander peoples as a spiritual authority deriving from or in relation to land,[18] which may be singular or plural across the territory of Australia.[19] Intricately connected to land and Country, this sovereignty has never been ceded through treaties with the British or Australian governments.[20] This is the position taken in the Uluru Statement from the Heart.[21] For the purpose of the analysis in this article, which is focused on matters of precedent, I adopt this position and accept that Aboriginal and Torres Strait Islander peoples were sovereign nations in this sense before the arrival of the British, and that sovereignty has never been ceded or extinguished. Adopting such a position allows a steadfast

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15 Sean Brennan, Brenda Gunn and George Williams, '"Sovereignty" and Its Relevance to Treaty-Making between Indigenous Peoples and Australian Governments' (2004) 26(3) *Sydney Law Review* 307, 311.

16 See, eg, Taiaiake Alfred, 'Sovereignty' in Joanne Barker (ed), *Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination* (University of Nebraska Press, 2005) 33, 39 <https://doi.org/10.2307/j.ctt1dnncqc.5>.

17 See, eg, Larissa Behrendt, 'Aboriginal Sovereignty: A Practical Roadmap' in Julie Evans et al (eds), *Sovereignty: Frontiers of Possibility* (University of Hawai'i Press, 2013) 163; Alfred (n 16). For an insight into how Paul Coe used this term post-*Coe*, see Paul Coe, 'The Struggle for Aboriginal Sovereignty' (1994) 13(1) *Social Alternatives* 10, 10.

18 See, eg, Referendum Council, 'Uluru Statement from the Heart' (Statement, First Nations National Constitutional Convention, 26 May 2017) ('Uluru Statement'); Alfred (n 16); Coe (n 17).

19 For an example of singular and plural sovereignty, see, eg, current processes for statewide and individual traditional owner treaty negotiations in Victoria. On 12 December 2025, in an historic first, Australia's first treaty with Aboriginal people commenced in Victoria: *Statewide Treaty*, First Peoples' Assembly of Victoria Ltd–Victoria, signed 13 November 2025 (entered into force 12 December 2025). See also *Statewide Treaty Act 2025* (Vic); 'Victoria's Historic Treaty Formally Commences with Cultural Celebration', *ABC News* (online, 12 December 2025) <https://www.abc.net.au/news/2025-12-12/victorias-historic-treaty-formally-begins/106137848>. For more detail on the agreed processes for negotiating traditional owner treaties, based on the idea of many sovereignties, see *Treaty Negotiation Framework*, First Peoples' Assembly of Victoria Ltd–Victoria (signed and entered into force 20 October 2022) 13–26, which is available online at <https://firstpeoplesvic.org/reports-resources/treaty-negotiation-framework/>. On the agreed processes for negotiating statewide treaties based on a more collective, singular sovereignty, see at 27–35.

20 See, eg, Michael Dodson, 'Sovereignty' [2002] (4) *Balayi* 13; Marcia Langton and Lisa Palmer, 'Treaties, Agreement Making and the Recognition of Indigenous Customary Polities' in Marcia Langton et al (eds), *Honour among Nations: Treaties and Agreements with Indigenous Peoples* (Melbourne University Press, 2004) 34; Aileen Moreton-Robinson, 'Introduction' in Aileen Moreton-Robinson (ed), *Sovereign Subjects: Indigenous Sovereignty Matters* (Allen & Unwin, 2007) 1, 2 <https://doi.org/10.4324/9781003117353-1> ('Sovereign Subjects'). Note: while treaties may involve the ceding of some or all aspects of sovereignty, it is certainly not necessary. In Victoria, there is no suggestion that sovereignty has been ceded through the recent *Statewide Treaty* (n 19).

21 'Uluru Statement' (n 18).

focus on the key question examined by this article, namely: whether, as a matter of *stare decisis*, the High Court has ruled out the possibility of Australian courts adjudicating any and all questions of First Nations sovereignty.

Furthermore, in order to maintain a focus on precedent, and to better understand how such questions have been heard by the Court, it is also necessary to make a conceptual distinction between absolute and modified sovereignty. Absolute sovereignty recognises First Nations sovereignty in full, unimpeded by colonisation, which adversely challenges British then Australian Crown sovereignty.[22] Modified sovereignty accepts that the imposition of Crown sovereignty has modified but not extinguished First Nations sovereignty, which places sovereignties in a relationship of co-existence.[23] In drawing this distinction, I take conceptual guidance from well-established common law doctrine in North America, which recognises that Aboriginal sovereignty continues to exist in a modified form, despite the assertion and imposition of Crown sovereignty.[24] Importantly, while the High Court has been asked questions of both absolute sovereignty and modified sovereignty with varying degrees of clarity, the Court has not carefully considered questions of modified sovereignty that recognise multiple sovereignties in one space or territory.[25] Instead, in a context of European etymology, the Court has primarily responded to either question by focusing on absolute sovereignty as a competing challenge to the legitimacy of Crown sovereignty. Absolute sovereignty creates a conundrum: because judicial authority derives from Crown sovereignty, an uncritical focus on absolute sovereignty has, in turn, led to conclusions of non-justiciability.

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22 Absolute sovereignty is often described as Westphalian, state, or exclusive sovereignty: see generally Stephen Tierney, *The Federal Contract: A Constitutional Theory of Federalism* (Oxford University Press, 2022) 85 <https://doi.org/10.1093/oso/9780198806745.001.0001>.

23 See, eg, 'Uluru Statement' (n 18). Modified sovereignty is often described as shared, merged, or diminished sovereignty: see generally *Report of the Royal Commission on Aboriginal Peoples* (Final Report, 1996) vol 2, ch 2 <https://www.bac-lac.gc.ca/eng/discover/aboriginal-heritage/royal-commission-aboriginal-peoples/Pages/final-report.aspx>. In his own writings, Paul Coe refers to this distinction using the language of international law, namely: external and internal sovereignty: Coe (n 17). See, also, *New South Wales v Commonwealth* (1975) 135 CLR 337, 376, 382 (McTiernan J), 452–8 (Stephen J), 480 (Jacobs J) ('*Seas and Submerged Land Case*'); Henry Wheaton, *Elements of International Law* (Steven and Sons, London, 1878) 28–9, quoted in *Seas and Submerged Lands Case* (n 23) 376 (McTiernan J). See also Popic (n 5) 119.

24 Note this is limited to conceptual guidance only. Any potential doctrinal guidance these cases might offer is beyond the scope of this article. In Canada, see, eg, *Reference re An Act Respecting First Nations*, *Inuit and Métis Children*, *Youth and Families*, 2024 SCC 5; *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10. In the United States, see, eg, the 'Marshall Trilogy' decided by Chief Justice Marshall of the United States Supreme Court in the early 19th century: *Johnson and Graham's Lessee v McIntosh*, 21 US (8 Wheat) 543 (1823) (Marshall CJ for the Court); *Cherokee Nation v Georgia*, 30 US (5 Pet) 1, 17 (1831) (Marshall CJ); *Worcester v Georgia*, 31 US (6 Pet) 515, 559 (1832) (Marshall CJ). Cf *Oklahoma v Castro-Huerta*, 597 US 629 (2022) (Kavanaugh J for Roberts CJ, Thomas, Alito, Barrett and Kavanaugh JJ).

25 On the relationship between absolute and modified sovereignty, see generally Harald Bauder and Rebecca Mueller, 'Westphalian vs Indigenous Sovereignty: Challenging Colonial Territorial Governance' (2023) 28(1) *Geopolitics* 156 <https://doi.org/10.1080/14650045.2021.1920577>. See also Kilduff and Wood (n 5); Paul Muldoon, 'Divided against Itself: Plural Sovereignties and the Australian State' in Jenny M Lewis and Anne Tiernan (eds), *The Oxford Handbook of Australian Politics* (Oxford University Press, 2020) 185, 185–6 <https://doi.org/10.1093/oxfordhb/9780198805465.013.12>.

With these terminological considerations in mind, I now turn to the key cases that form the basis of the current position as a matter of precedent.

III CURRENT POSITION

The High Court has consistently described questions of First Nations sovereignty as non-justiciable.[26] Scholars have generally made the same assumption.[27] However, others have gone further, suggesting that the Court has rejected the existence of First Nations sovereignty.[28] Yet, as I argue in this Part, the most the Court has done is take a position of non-justiciability, and this position has limited precedential value because it rests on one case, *Coe*, which is not formally binding.

Re-tracing the High Court's steps in this Part, it becomes apparent that questions of First Nations sovereignty came before the High Court for the first time in 1977 when the case of *Coe* was initiated. Several lower courts had previously addressed similar questions, but these cases exerted little influence in *Coe*.[29] *Coe* was an original jurisdiction matter led by Wiradjuri lawyer and prominent activist Paul Coe (1949–2025) alongside four Aboriginal colleagues, raising questions of absolute and modified sovereignty, the doctrine of discovery, and native title.[30]

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26 See above n 1.

27 See above n 2. See especially Grose (n 2) 43: 'In one sentence the summary of the issue of [I]ndigenous sovereignty in Australian municipal courts is that it is a non-justiciable issue.'

28 See, eg, *Love* (n 1) 200–1 [102] (Gageler J). See also Darryl Cronin, 'Trapped by History: Democracy, Human Rights and Justice for Indigenous People in Australia' (2017) 23(2) *Australian Journal of Human Rights* 220, 222 <https://doi.org/10.1080/1323238X.2017.1373739>.

29 See especially *R v Ballard* [1829] NSWSC 26 (21 April 1829); *R v Murrell* (1836) 1 Legge 72 ('*Murrell*'); *R v Bonjon* (Supreme Court of New South Wales, Willis J, 16 September 1841). Note that legal historian Bruce Kercher led a highly influential colonial case law project, which uncovered long-forgotten colonial court decisions: Bruce Kercher, 'Recovering and Reporting Australia's Early Colonial Case Law: The Macquarie Project' (2000) 18(3) *Law and History Review* 659 <https://doi.org/10.2307/744073>. This project recovered *R v Ballard* (also published as *R v Dirty Dick* (1828) NSW Sel Cas (Dowling) 2), as well as publishing new versions of *R v Murrell* based on a wider range of sources (also published as *R v Murrell and Bummaree* [1836] NSWSC 35): see Bruce Kercher, '*R v Ballard*, *R v Murrell* and *R v Bonjon*' (1988) 3(3) *Australian Indigenous Law Reporter* 410 ('AIL Reports'); Bruce Kercher, 'Recognition of Indigenous Legal Autonomy in Nineteenth Century New South Wales' (1998) 4(13) *Indigenous Law Bulletin* 7. In recovering more details about these colonial cases, Kercher at times navigated naming confusion, including in cases such as *R v Ballard*, which had also been erroneously named as *R v Dirty Dick* in Dowling's Select Cases. As Shaunnagh Dorsett explains, in *R v Ballard*, the question of the Court's jurisdiction over intra-Aboriginal disputes arose when the Attorney-General sought to charge an Aboriginal man called Ballard (or Barrett) for allegedly killing another 'Aboriginal man called Borrondire, or Dirty Dick, near the Domain, not far from Sydney': see Shaunnagh Dorsett, 'Plural Legal Orders: Concept and Practice' in Peter Cane, Lisa Ford and Mark McMillan (eds), *The Cambridge Legal History of Australia* (Cambridge University Press, 2022) 19, 25 <https://doi.org/10.1017/9781108633949.002>. For more recent 20th century cases, see especially *Milirrpum v Nabalco* (1971) 17 FLR 141 ('*Milirrpum v Nabalco*'); *R v Wedge* (1976) 1 NSWLR 581 ('*Wedge*'). While not decisions by lower courts, see also *Cooper v Stuart* (1889) 14 App Cas 286 ('*Cooper v Stuart*'); *Tuckiar v The King* (1934) 52 CLR 335.

30 Paul Coe was a proud Wiradjuri man who recently passed, leaving behind a powerful legacy: Jarred Cross, 'Tributes Flow for Wiradjuri Champion', *National Indigenous Times* (Perth, August 2025) 7; 'Remembering Paul Coe: First Nations Activist', *The Commons: Social Change Library* (Web Page,

Unsuccessful at both first instance and appeal, Gibbs J, with Aickin J in agreement, was highly critical of the plaintiff's statement of claim, especially the broad and generalised nature of the plaintiff's claims to sovereignty, land, and compensation over Australia.[31]

Taking on board these concerns, several years later in 1982, five Meriam plaintiffs Eddie Koiki Mabo, Reverend David Passi, Sam Passi, James Rice, and Celuia Mapo Sale lodged a statement of claim over Mer, an island in the Torres Strait.[32] Strategically crafted to focus on land rather than sovereignty, and including highly specific details to avoid delivering a general claim like the applicants in *Coe* had, this resulted in their successful native title case, *Mabo v Queensland [No 2]* ('*Mabo*'), handed down 10 years later in 1992.[33] Known for its carefully reasoned and significant changes to the doctrine of tenure and terra nullius through the recognition of native title, the High Court did not explore questions of First Nations absolute or modified sovereignty in any depth.[34]

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19 December 2025) <https://commonslibrary.org/remembering-paul-coe-first-nations-activist/>; Toby Hemmings and Lani Oatway, 'Indigenous Lawyer and Human Rights Activist Paul Coe Farewelled in Cowra', *ABC News* (online, 14 August 2025) <https://www.abc.net.au/news/2025-08-14/indigenous-activist-lawyer-paul-coe-funeral/105651192>. The eldest of five children, Coe was born at Erambie Mission in Cowra on Wiradjuri Country, which is in central New South Wales ('NSW'), with the Wiradjuri Nation being the largest Aboriginal nation in NSW by area and population. For a map and language samples, see 'Gambay', *First Languages Australia* (Web Page) <https://gambay.com.au/> ('Gambay Map'). He studied law at the University of New South Wales (where he was the first Aboriginal student to do so), and was part of a group of young activists, including his sister Isabel Coe, Gary Foley, Billy and Lyn Craigie, Gary Williams, Bronwyn Penrith, Tony Coorey, James Wedge, Bob and Sol Bellear, Alanna Doolan, Ann Weldon, Les Collins, Gordon Briscoe, and Cecil Patten who set up the Aboriginal Legal Services ('ALS') in 1971. In 1972, Paul Coe along with Pearl Gibbs, Chicka Dixon, Billy Craigie, and Isabel Coe set up the Aboriginal Tent Embassy outside Parliament in Canberra to advocate for basic human rights and justice. He spoke to many Members of Parliament including Prime Minister Gough Whitlam to advocate for nationally funding legal aid offices across the country. He was Chairman of the Aboriginal Legal Services in 1973, went to the Bar in Sydney in 1982 becoming the first Aboriginal barrister in New South Wales, but was disbarred in 1997. See Jon Faine, *Lawyers in the Alice: Aboriginals and Whitefellas' Law* (Federation Press, 1993) ch 3; 'Paul's a Prefect' (June 1968) *Dawn* 15 <https://aiatsis.gov.au/collection/featured-collections/dawn?combine=1968&items_per_page=24>; Gary Foley, 'White Police and Black Power: Part 1', *Aboriginal Legal Service* (Web Page, 9 July 2021) <https://www.alsnswact.org.au/white_police_black_power_1>.

31 *Coe* (n 1) 407.

32 From 28–30 August 1981, a 'Land Rights and the Future of Australia's Race Relations' conference was held at James Cook University in Townsville, Queensland, bringing together First Nation leaders and lawyers to discuss strategies for developing a High Court test case on land rights. Eddie Mabo famously spoke at this conference, sharing his ideas that would form the basis of litigation, and his paper was later published: Eddie Koiki Mabo, 'Land Rights in the Torres Strait' in Erik Olbrei (ed), *Black Australians: The Prospects for Change* (James Cook University Students Union, 1982) 143. The case focused on questions of land, not sovereignty, and sought land rights over Meriam country, which is located in the eastern Torres Strait, and focused on the three Murray islands, including Mer (Murray), and the adjacent islands Dawar and Waier. For maps of additional Meriam Country and to hear the language of Meriam-Mir, see the 'Gambay Map' (n 30), and associated videos here: <https://gambay.com.au/languages?language=Meriam+Mir>.

33 *Mabo* (n 1).

34 Ibid 31–2 (Brennan J), 184 (Toohey J).

The following year, in 1993, prominent Wiradjuri activist Isabel Coe asked the Court to reopen questions of sovereignty it had largely abstained from in *Mabo*.[35] In *Coe v Commonwealth* ('*Coe (on behalf of the Wiradjuri)*'), like her brother's case 15 years earlier, a single justice of the High Court exercising original jurisdiction dismissed the plaintiff's pleadings in a first instance, pre-trial decision for failing to contain a reasonable cause of action. Unlike her brother, the matter was not appealed. Since then, the Court has continued to face direct questions of First Nations sovereignty[36] as well as indirect questions arising in native title or under specific constitutional powers.[37] On each occasion, the Court has offered brief restatements of its position without detailed elaboration.[38]

Throughout these cases, the High Court has consistently declined to closely engage with the complexities inherent in the concept of sovereignty, such as the distinction between absolute and modified sovereignty, while also overlooking the criteria for determining justiciability. While the first instance, original jurisdiction, procedural context in which most of these questions have arisen is a factor limiting judicial engagement with such complex issues, this is also partly a consequence of the concept of non-justiciability serving as a 'conclusory label'.[39] Consider, for example, the manner in which Brennan J in *Mabo* simply quoted Gibbs J in *New South Wales v Commonwealth* ('*Seas and Submerged Lands Case*') to apply the act of state doctrine, in order to conclude that the acquisition of territory is an act of state that cannot be challenged in domestic courts.[40] Using justiciability more as a conclusion than a reason, Brennan J was able to assume sovereignty was absolute,

35 Isabel Coe (1951–2012) was a proud Wiradjuri woman and prominent Indigenous leader. She was a prolific campaigner for Indigenous sovereignty, and a significant actor in the setting up of the Aboriginal Tent Embassy, the ALS, and many other Aboriginal organisations in Redfern. She was the lead litigant in *Coe (on behalf of the Wiradjuri)* (n 1), where she unsuccessfully challenged the Australian Government to recognise the sovereignty of the Wiradjuri nation: see Lindy Kerin, '"Determined" Aboriginal Campaigner Isabel Coe Dies', *ABC News* (online, 12 November 2012) <https://www.abc.net.au/news/2012-11-12/aboriginal-campaigner-isabelle-coe-dies/4366472>.

36 *Walker* (n 1); *Thorpe* (n 1).

37 *Yorta Yorta* (n 1); *Love* (n 1).

38 The High Court's position has been followed by several supreme courts and the Federal Court: see, eg, *Re Phillips; Ex parte Aboriginal Development Commission* (1987) 13 FCR 384; *Fyffe v Victoria* [1999] VSCA 196; *Commonwealth v Coe* [2000] NSWSC 1243; *Coe v Commonwealth* [2001] NSWCA 36; *Coe v Commonwealth* [2001] NSWCA 49; *Commonwealth v Coe* [2002] NSWSC 94; *R v Buzzacott* (2004) 154 ACTR 37 ('*R v Buzzacott*'); *McDonald v DPP (Vic)* (2010) 26 VR 242; *R v Anning* (2013) 65 MVR 72; *Australian Securities and Investments Commission v White* [1998] FCA 850; *Buzzacott v Gray* [1999] FCA 1525, [31] (von Doussa J); *Bloomfield v Brown* (2003) 176 FLR 358, 365–6 [34]–[35] (Connolly J); *Walker v South Australia [No 2]* (2013) 215 FCR 254; *Lacey v Earle* [2014] ACTSC 397; *Ngurampaa Ltd v Brewarrina Shire Council* [2014] NSWSC 524; *Ngurampaa Ltd v Balonne Shire Council* [2014] QSC 146 ('*Ngurampaa v Balonne*'); *Kerinaiua v Andreou* [2018] NTSC 87. In general, when this issue has arisen in lower courts, judicial reasons have been succinct, largely relying on the High Court's position in the pre and post-*Mabo* decisions of *Coe* (n 1) and *Coe (on behalf of the Wiradjuri)* (n 1). For examples of lower courts restating the High Court position of non-justiciability without providing further reasons, see, eg, *R v Buzzacott* (n 38) 39–42 [7]–[16] (Connolly J); *Ngurampaa v Balonne* (n 38) [14] (Philippides J). For examples of the High Court doing the same, see, eg, *Walker* (n 1) 48–9 (Mason CJ); *Thorpe* (n 1) 772 (Kirby J); *Love* (n 1) 177 [26] (Kiefel CJ), 200–1 [102] (Gageler J), 226–7 [200] (Keane J), 250 [266] (Nettle J), 279 [356] (Gordon J).

39 Kirk (n 7) 518.

40 Mabo (n 1) 31, quoting *Seas and Submerged Lands Case* (n 23) 388.

deriving from the British then Australian Crowns, and thus did not engage with the variegated meanings of sovereignty, such as modified sovereignty, or the criteria for determining non-justiciability.[41] While questions of First Nations sovereignty were not directly before the *Mabo* court, which faced highly targeted questions of land carved out from questions of sovereignty, later High Courts have applied *Mabo* more directly to questions of First Nations sovereignty, and in doing so, repeated a pattern of limited judicial engagement.[42]

Both before and after *Mabo*, questions of First Nations sovereignty have been addressed briefly by the Court, often dismissed in a mere sentence or two, and at times labelled 'absurd'.[43] One factor to this brevity is that absolute sovereignty has largely overshadowed modified sovereignty. For example, when faced with issues concerning the aliens power in section 51(xix) of the *Australian Constitution*, Keane J in *Love v Commonwealth* ('*Love*') wrote:

> The assertion of a claim to sovereignty has been rejected on the few occasions on which it has been articulated. Thus, in *Coe v Commonwealth* [*Coe (on behalf of the Wiradjuri)*], Mason CJ [at first instance] said:
>
> > *Mabo (No 2)* is entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia. The decision is equally at odds with the notion that there resides in the Aboriginal people a limited kind of sovereignty embraced in the notion that they are 'a domestic dependent nation'.[44]

The reference to 'domestic dependent nation' is an American common law description of modified sovereignty that co-exists with state sovereignty.[45] Overlooking divergent meanings, Keane J endorsed Mason CJ's collapse of modified sovereignty in *Coe (on behalf of the Wiradjuri)* into absolute sovereignty necessarily adverse and 'equally at odds' to British sovereignty. Gageler J in *Love* was even more curt when taking a similar approach, noting: 'Australian courts before and after *Mabo* ... as well as in the reasoning in *Mabo*, itself, have consistently rejected the *existence* of Aboriginal or Torres Strait Islander sovereignty'.[46]

In addition to the brevity and the overshadowing of modified sovereignty by absolute sovereignty, note the slippage between non-justiciability and non-existence in these passages. Keane J in *Love* described the 'assertion' of sovereign

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41 On the uncertain content and application of the act of state doctrine in common law courts, see Matthew Alderton, 'The Act of State Doctrine: Questions of Validity and Abstention from *Underhill* to *Habib*' (2011) 12(1) *Melbourne Journal of International Law* 1. See also Popic (n 5), who uses the language of international law to distinguish between internal and external sovereignty (largely analogous to modified and absolute sovereignty) and their differing relationships to the act of state doctrine, to argue that reference to the act of state doctrine does not necessarily mean that all questions of First Nations sovereignty are non-justiciable: see also discussion and references above n 25.

42 See especially *Coe (on behalf of the Wiradjuri)* (n 1).

43 See, eg, *Coe* (n 1) 407 (Gibbs J).

44 *Love* (n 1) 226–7 [200] (citations omitted). Keane J limited citations on this point to Mason CJ's judgment in *Coe (on behalf of the Wiradjuri)* (n 1) and *Walker* (n 1) 50 (Mason CJ). *Coe* (n 1) was not cited.

45 See the 'Marshall Trilogy' of cases above n 24.

46 *Love* (n 1) 200–1 [102] (emphasis added) (citations omitted). Gageler J provided more fulsome citation than Keane J, citing these cases before *Mabo*: *Murrell* (n 29) 73 (Forbes CJ); *Wedge* (n 29); *Coe* (n 1) 408 (Gibbs J), 409–11 (Jacobs J), 412 (Murphy J); and these cases after *Mabo*: *Coe (on behalf of the Wiradjuri)* (n 1); *Walker* (n 1) 48–9 (Mason CJ).

claims being rejected, which suggests a conclusion of justiciability. In contrast, Mason CJ in *Coe (on behalf of the Wiradjuri)* seemed to suggest the impossibility of existence, and Gageler J in *Love* was explicit that prior cases rejected 'existence'. A substantive conclusion that First Nations sovereignty does not – and cannot – exist in Australia assumes that the preliminary question of justiciability is satisfied. In my view, skipping over issues of justiciability when faced with fundamental issues such as sovereignty, especially in the absence of reasons, limits the potential precedential value in this respect.[47] While brevity makes it difficult to further analyse the different approaches, the pattern of sparse reasoning suggests that sovereignty is often assumed to be absolute, and non-justiciability tends to serve as a conclusory label.[48]

Why has there been such brevity of reasons on this foundational topic? It is crucial to acknowledge that there has never been a trial in Australia on the question of common law recognition of the ongoing justiciability, let alone existence, of First Nations sovereignty or sovereignties. Instead, questions of sovereignty have only directly arisen in first instance, pre-trial, interlocutory proceedings that have been conducted prior to a full hearing of the evidence and detailed arguments by parties.[49] All High Court cases directly tackling this question, including *Coe*, *Coe (on behalf of the Wiradjuri)*, *Walker v New South Wales* ('*Walker*'), and *Thorpe v Commonwealth [No 3]* ('*Thorpe*'), were original jurisdiction matters heard at first instance by a single High Court judge concerned with interlocutory issues of practice and procedure: largely equivalent to a mention in a state magistrate's court.[50] On all occasions bar one, namely *Coe*, the first instance decision was the final outcome. The early nature of these proceedings has meant that issues of sovereignty have been addressed in pre-trial circumstances highly focused on preliminary procedural matters. Understandably, in this procedural context, judgments have been delivered with more abbreviated reasons than what is commonly delivered in post-trial judgments. While the High Court has touched on issues of sovereignty in several, well-known, post-trial, full court, appellate decisions, such as *Wacando v Commonwealth* ('*Wacando*'), *Mabo*, *Members of the Yorta Yorta Aboriginal Community v Victoria*, and *Love*, on these occasions the Court has again offered

47 See, eg, *Love* (n 1) 200–1 [102] (Gageler J), as discussed above in this Part. This is not to exclude the possibility that this practice might be appropriate in other legal circumstances.

48 Other Justices were also brief on this particular point: see, eg, *Love* (n 1) 176–7 [25] (Kiefel CJ), 249–51 [265]–[267] (Nettle J), 278–9 [356]–[357] (Gordon J). *Love* (n 1) is not the exception, but repeated a pattern of brevity set in earlier cases: see, eg, *Walker* (n 1) 48–9 (Mason CJ); *R v Buzzacott* (n 38) 39–42 [7]–[16] (Connolly J); *Ngurampaa v Balonne* (n 38) [14] (Philippides J). There are some notable exceptions: see, eg, *Thorpe* (n 1) 772 (Kirby J); *Coe* (n 1) 411–12 (Murphy J).

49 All four High Court cases on questions of Aboriginal sovereignty were resolved by the pre-trial dismissal of pleadings: *Coe* (n 1); *Coe (on behalf of the Wiradjuri)* (n 1); *Walker* (n 1); *Thorpe* (n 1).

50 In drawing an equivalence to a mention, note that single Justices of the High Court historically held trials by sitting alone to hear evidence. This practice ended in 1977 when the Federal Court of Australia first exercised its jurisdiction established by the *Federal Court of Australia Act 1976* (Cth), just prior to the 1978 hearing in *Coe*. The general practice more recently has been for parties to agree on the facts or respondents to demur: see generally Kristen Walker, 'Authority of the High Court of Australia' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 449.

limited reasoning in support of repeating its assumed position of non-justiciability developed in earlier interlocutory, procedural cases such as *Coe*.[51]

To conclude this Part, it is helpful to place key cases in relation to each other in terms of *stare decisis*. The well-established rules of precedent involve accounting for when a decision was made, who made the decision (noting court hierarchy), whether a statement of principle was necessary to resolve the case or merely a passing comment (ie, ratio or obiter), and in decisions involving multiple judgments, the number of judges giving support to the principle.[52]

Applying these rules, the starting point as a matter of *stare decisis* is *Coe* rather than earlier, lower court cases. Heard at first instance by Mason J, sitting alone, *Coe* was decided on appeal by a full court of the High Court in 1979. As the only appellate decision by the High Court directly on this point, *Coe* is presumptively binding on any subsequent decisions by lower courts, including those of single High Court judges. While the issue of sovereignty was briefly mentioned but remained largely untouched in *Mabo*, the next direct engagement with questions of sovereignty arose in the post-*Mabo* context of *Coe (on behalf of the Wiradjuri)* in 1993.[53] This matter was heard at first instance by Mason CJ, sitting alone as a single judge in the High Court's original jurisdiction. Unlike *Coe*, it was not appealed. Subsequent High Court cases of *Walker* and *Thorpe* were likewise decisions of single judges sitting at first instance exercising the High Court's original jurisdiction, and as such, like *Coe (on behalf of the Wiradjuri),* presumptively bound by the prior appellate decision of *Coe*.

Under *stare decisis*, therefore, *Coe* is the lead authority, and clearly more senior than later first instance decisions, such as *Coe (on behalf of the Wiradjuri)*.[54] Accordingly, to gain a better understanding of the High Court's current position on sovereignty, in Part IV of this article, I closely examine the lead authority of *Coe*.

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51 *Wacando* (n 1) concerned the substantive issue of whether Erub (Darnley Island) in the Torres Strait forms part of the State of Queensland. *Mabo* concerned the question of land rights in Mer. *Love* concerned the reach of the aliens power. Keane J in *Love* (n 1) captured this avoidance: 'Political sovereignty is not an incident of native title. Indeed, the recognition of native title in *Mabo [No 2]* proceeded squarely on the footing that sovereignty reposes elsewhere than in the holders of native title, and that native title remains vulnerable to the exercise of sovereign power.': at 226 [199] (citations omitted). For a good explanation of how *Love* (n 1) engages with questions of sovereignty, see Aird and Ardill (n 5).

52 For an introductory text, see David Hamer et al, *Laying Down the Law* (LexisNexis, 12th ed, 2024) chs 7–8.

53 Despite the potential confusion caused by the similar shorthand naming of these cases as *Coe* and *Coe (on behalf of the Wiradjuri)*, it is important to recognise these are not part of a singular case series involving the same parties that is related by process (cf *Mabo [No 1]* and *Mabo [No 2]*). Instead, here, two separate plaintiffs initiate two separate cases in the High Court. However, because they are siblings with the same family surname, Paul Coe and Isabel Coe, and were both suing the same first defendant, the Commonwealth, abbreviation conventions create confusion. Further, due to the use of 'anors' or 'another' to denote second defendants, the difference in second defendants does not impact naming conventions: in *Coe* the second defendant was the United Kingdom while in *Coe (on behalf of the Wiradjuri)* the second defendant was NSW. These two cases were led by different plaintiffs, decided 15 years apart, but raise similar issues of law and fact in that each separate action raises the issue of Aboriginal sovereignty in a statement of claim, which is resisted by the respondent Commonwealth, and dealt with as a pre-trial issue of procedure. For this topical reason, rather than the familial relationship, they are treated as 'like' cases under the doctrine of precedent.

54 Cf *Love* (n 1) 226–7 [200] (Keane J), where *Coe (on behalf of the Wiradjuri)* (n 1) was cited as the lead authority.

This analysis provides the context for Part V of this article, where I examine the status and precedential value of decisions by evenly divided courts to argue that *Coe* has been misinterpreted. This error contorts a line of jurisprudence, and means a future High Court may wish to revisit this question in more depth when the opportunity arises.

IV THE LEAD AUTHORITY OF *COE*

In this Part, I argue that the leading authority under the doctrine of precedent is a poorly reasoned decision by an evenly divided court on an interlocutory procedural matter. This lays the groundwork for my argument that *Coe* does not provide authority for the principle that all questions of First Nations sovereignty are non-justiciable.

A Procedural History

On 18 July 1977, Paul Coe filed a writ of summons in the High Court against the Australian and British governments, challenging the legality of colonisation and its ongoing consequences.[55] Coe was a Wiradjuri man, prominent activist, and former lawyer.[56] Like Coe's earlier collaborative work establishing the Tent Embassy and Aboriginal Legal Service, he was not alone in these proceedings. Identical documents were issued by Avery Brown, Ernest Creighton, Lawrence Davis, and Lyall Munro Snr.[57] Each statement of claim sought relief for the occupation of, and continued dealing in, Australian lands by English then Australian governments, on behalf of a single claim group described as 'the Aboriginal nation'.[58] Relief focused on the consequences of colonisation, including deprivation of proprietary and religious rights, and interference with 'culture, religion, customs, language

55 This case fell within the High Court's original jurisdiction under section 75 of the *Australian Constitution*, and so was heard, at first instance, before a single judge of the High Court. Parties included the Commonwealth (*Australian Constitution* s 75(iii)) and United Kingdom (*Australian Constitution* s 75(ii)), and an injunction was sought against an officer of the Commonwealth (*Australian Constitution* s 75(v)).

56 For a more detailed biography, see above n 30.

57 Avery Brown is a Bundjalung man who retired from the ALS in 2017 after 28 years, and received a Community Service Award from the NSW Government in 2018: Thoward, 'Aboriginal Legal Service Stalwart Calls It a Day', *The Daily Telegraph* (online, 24 January 2017) <https://www.dailytelegraph.com.au/news/nsw/grafton/aboriginal-legal-service-stalwart-calls-it-a-day/news-story/9eb78c946cddbb6d6d3ac830c01ce0cd>; Thoward, 'Community Leader Receives Much-Deserved Premier's Award', *The Daily Telegraph* (online, 18 May 2018) <https://www.dailytelegraph.com.au/news/nsw/grafton/community/community-leader-receives-muchdeserved-premiers-award/news-story/2b306ec9a855272bedc524e2829424b1>. Uncle Lyall Thomas Munro Snr (1931-2020) was a Komeroi Elder who died in 2020, having helped set up the ALS and been a freedom rider in 1965: see Jessie Davies, 'State Funeral Held for Freedom Rider Uncle Lyall Munro Senior', *ABC News* (online, 11 July 2020) <https://www.abc.net.au/news/2020-07-11/state-funeral-for-aboriginal-activist-uncle-lyall-munro-senior/12443780>. There is little publicly available information on Ernest Creighton, a Kamilaroi man, and Lawrence Davis.

58 *Coe v Commonwealth* (1978) 18 ALR 592, 595–6 (Mason J) ('*Coe First Instance*'). This is also described in the pleading as 'the Aboriginal people of Australia': at 592. The claim of a single Aboriginal polity contrasts with specific First Nations groups' claims, both of which are recognised in the current Victorian treaty process: see above n 19.

and way of life' by seeking two declarations.[59] First, that all land occupied and used by Aboriginal people remain 'at the absolute command of the [A]boriginal people free from interference', and second, that legislation allowing for land transfers or mining be declared invalid.[60] An injunction was also sought to prevent the Australian Government and its actors from mining, especially uranium mining on sacred sites, as well as $20,000 million compensation.[61]

On 2 September 1977, the Commonwealth of Australia as first defendant sought to strike out these claims. Before hearing this motion, Coe applied for leave to amend on 23 September 1977. Folding together five corresponding plaintiff actions into one representative action on behalf of 'the' singular Aboriginal nation of Australia, Coe became the lead plaintiff. The amendments were extensive, leaving only one original paragraph intact.[62] Across four parts, its presentation was described as 'generally badly drawn'.[63] In substance, the first part garnered the most attention as the plaintiffs argued 'the' Aboriginal nation is sovereign, raising questions about how Aboriginal sovereignty in the singular (cf multiple sovereign First Nations) might relate to Crown sovereignty as adverse and in competition (ie, absolute sovereignty) or co-existing (ie, modified sovereignty).[64] The plaintiffs also challenged the proclamation of British sovereignty as wrongful, disputed Australia's classification under the doctrine of discovery, and argued these errors had consequences, such as invalid mining legislation authorising uranium exports from sacred Country.[65]

The remaining three parts included a series of alternative arguments. The second part accepted the classification of settlement but argued for an early version of native title. The third part also ran a native title claim but on the basis that Australia was conquered not settled territory: inviting the Court to revisit the classification of Australia. The fourth part reversed the earlier three parts, arguing Aboriginal proclamations of absolute sovereignty in ceremonies raising the Aboriginal flag in Australia (Dharawal Country, Kurnell, New South Wales) and England (Dover, United Kingdom) were recognisable acts of sovereign acquisition under the doctrine of discovery, protected by the act of state doctrine, and sufficient to ground claims of Aboriginal discovery against the British and

59 *Coe* (n 1) 405 (Gibbs J).

60 Ibid.

61 Ibid.

62 The amended statement of claim was set out in full in the appeal judgment of Gibbs J, but summarised by Mason J at first instance who described the amendments as 'so extensive' and 'markedly' different it was 'virtually an entirely new document': *Coe First Instance* (n 58) 593.

63 *Coe* (n 1) 412 (Murphy J).

64 While the language of absolute and modified sovereignty was not used in the statement of claim, the plaintiffs described prior Aboriginal sovereignty over the whole continent as 'exclusive sovereignty' in paragraph 4 of the statement of claim, which is a version of absolute sovereignty: ibid 404 (Gibbs J). Further, in paragraph 8A of the statement of claim, First Nations and Crown sovereignty were placed in opposition by arguing terra nullius was wrongly proclaimed: at 404 (Gibbs J). Subsequent arguments, such as native title, rested on assumptions of coexisting rather than competing sovereignties, which I describe as modified sovereignty, discussed above in Part II(B).

65 On the doctrine of discovery, see below n 109.

Australian governments.[66] This last part was interpreted as political activism rather than legitimate legal claim, garnering the ire of the Court.[67]

Mason J exercised the High Court's original jurisdiction in the first instance.[68] As standard practice, mentions were held, taking 2.5 hours of court time.[69] Faced with competing applications to amend and strike out the pleading, Mason J had a choice to hear applications sequentially or together. In a decision described by the appeal court as 'not without significance',[70] Mason J heard Coe's application before the Commonwealth's, which the Commonwealth opposed.[71] The second defendant, Great Britain, was properly served but did not file an appearance.[72] On 22 March 1978, Mason J handed down a judgment refusing leave to amend and effectively ending the case before trial. The plaintiff appealed to a full court of the High Court that sat with only four judges. On 5 April 1979, the appellate court handed down its decision. Two judges granted leave to amend while two denied leave, creating an evenly divided appellate court with no immediate outcome. Section 23(2)(a) of the *Judiciary Act 1903* (Cth) ('*Judiciary Act*') governs these situations and generated an outcome, which affirmed Mason J's first instance decision and dismissed the application. Given its role in resolving this appellate stalemate, it is helpful to pay some attention to the first instance decision.

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66 *Coe* (n 1) 407 (Gibbs J). The first proclamation in November 1976 involved Paul Coe (Wiradjuri) and Cecil Patten (Bundjalung) rowing ashore in Devon, England, and planting the Aboriginal flag to claim it under the doctrine of discovery: Madison Howarth, 'In 1976, Two Aboriginal Men Claimed England: Their Actions Mocked the Lie of Terra Nullius', *SBS NITV* (online, 6 February 2024) <https://www.sbs.com.au/nitv/article/in-1976-two-first-nations-men-claimed-england-their-actions-proved-terra-nullius-was-a-lie/uar766rmf>. A second proclamation in July 1977 involved a group led by Coe planting an Aboriginal flag at the monument commemorating Captain Cook's landing in Kurnell on Dharawal Country and proclaiming: 'On this day we, members of the [A]boriginal nation, confirm ourselves as a sovereign people. Alongside this monument, which perpetuates a false claim, we plant our flag to demonstrate our legal dominion over the whole of the Australian territory': 'Aborigines [sic] Declare National Supremacy', *Newcastle Morning Herald and Miner's Advocate* (Newcastle, 11 July 1977) 7 (author unknown, which was common practice in newspapers at the time).

67 See, eg, *Coe* (n 1) 412 (Murphy J). While the Court was not explicit, it is plausible this part of the pleading was deemed non-justiciable for reasons relating to the 'political doctrine' test, discussed above in Part II(A).

68 Mason J became Chief Justice of the High Court of Australia in 1987, and as Chief Justice decided *Coe (on behalf of the Wiradjuri)* (n 1) as a first instance judge sitting alone in 1993.

69 Mentions are short interlocutory hearings used in civil matters to progress cases. Mentions focus on preliminary procedure, and may identify pre-trial issues that require resolution or determine the time for the trial or any further mentions: *LexisNexis Concise Australian Legal Dictionary* (6th ed, 2021) 'mention' (def 2). On this occasion, three mentions in total took 2 hours and 37 minutes, which is approximately a half-day of court time. More specifically, on 4 September 1977, the Court sat for 13 minutes (10:15–10:28am). On 28 September 1977, the Court sat for 41 minutes (10:15–10:56am), and on 13 October 1977, the Court sat for 1 hour and 43 minutes (10:15–11:58am).

70 *Coe* (n 1) 409 (Jacobs J).

71 Consistent with their own strike out application, the Commonwealth opposed the plaintiffs' application for amendment on the basis of *High Court Rules 1952* (Cth) order 29 rule 1(2) ('*HCR 1952*') (not 'necessary' to determine the 'real questions in controversy'), and that if allowed, it would be subsequently struck out under either order 26 rule 18(a) (failing to disclose a reasonable cause of action) or under order 20 rule 29 (unnecessary, prejudicial, embarrassing, or delaying the fair trial of an action): *Coe First Instance* (n 58) 593 (Mason J).

72 All documents were delivered to United Kingdom High Commission: see *Coe First Instance* (n 58) 593 (Mason J).

B First Instance

Mason J's dismissal was delivered in a sparse 6-page judgment.[73] Tellingly, after summarising the pleading, his Honour started by questioning whether the United Kingdom of Great Britain could be sued in the High Court, concluding as 'this is a question of *some importance* I do not propose to deal with it on an application for leave to amend'.[74] While the question of Great Britain's standing was off limits, Mason J deemed questions of sovereignty, land rights, and the doctrine of discovery, which are at least arguably equally important, as appropriately addressed at this very early stage of proceedings.

In this procedural context, Mason J found the lack of particulars rendered the first part 'deficient' for not providing a known cause of action, readily concluding there was 'no justification' for ongoing Aboriginal sovereignty.[75] For Mason J, such a proposition was 'plainly unarguable'.[76] Although the act of state doctrine was not cited, Mason J seemed to rely on these general ideas when interpreting Aboriginal sovereignty as only meaning absolute sovereignty (ie, adverse to Crown sovereignty) that is 'inconsistent with the accepted legal foundations of Australia deriving from British occupation and settlement' and hence necessarily unchallengeable.[77] The remaining three parts were promptly dismissed. Delivering reasoning largely focused on minor matters of technique and expression, Mason J was highly critical of the formatting, numbering, 'avoidable repetition', and 'ill-assorted medley of claims' as being 'deficient' for failing to identify relevant particulars.[78] His Honour declined to engage with pleadings delivered in the alternative – a widespread practice – that in this pleading challenged then accepted the imposition of British sovereignty based, in part, on differential meanings of sovereignty.[79] For these reasons, Mason J dismissed the plaintiff's application for

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73 Three of those six pages summarised the proposed amended statement of claim.

74 *Coe First Instance* (n 58) 595 (emphasis added). Mason J assumed 'for present purposes' the United Kingdom could be sued as a proper party.

75 Ibid 595–6.

76 Ibid 596.

77 Ibid, noting that Mason J was also dismissive of the role of international law in the *Western Sahara (Advisory Opinion)* (1975) ICJ 12. See also Alderton (n 41); Popic (n 5).

78 *Coe First Instance* (n 58) 596–7.

79 Pleading in the alternative is often referred to as 'inconsistent pleadings' or 'inconsistent allegations or claims' and occurs where parties make inconsistent allegations of fact in a pleading while making it clear that the allegations are pleaded in the alternative: see, eg, *Phillips v Phillips* (1878) 4 QBD 127, 134 (Bramwell LJ); *Chadwick v Bridge* (1951) 83 CLR 314; *Re Morgan* (1887) 35 Ch D 492; *Delfino v Trevis [No 2]* [1963] NSWR 194, 196 (Walsh J); *Mulivai v Utaileio* (2022) 11 QR 797, 805 [19]–[20] (Bond JA, Dalton and Flanagan JJA agreeing at 809 [27]–[28]). This is legislatively enshrined in *Federal Court Rules 2011* (Cth) r 16.06; *Court Procedure Rules 2006* (ACT) r 414; *Uniform Civil Procedure Rules 2005* (NSW) r 14.18; *Supreme Court Rules 1987* (NT) r 13.09; *Uniform Civil Procedure Rules 1999* (Qld) r 154; *Uniform Civil Rules 2020* (SA) r 67.2(3); *Supreme Court Rules 2000* (Tas) r 230; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 13.09; *Rules of the Supreme Court 1971* (WA) ord 20 r 11. See generally Stephen Colbran, Peta Spender and Tania Penovic, *Civil Procedure: Commentary and Materials* (LexisNexis Australia, 8th ed, 2022) 506; Claudio Bozzi, *Principles of Civil Procedure in Victoria* (Lawbook Co, 2nd ed, 2018) 340–2. On the limits of pleading in the alternative, including when it might become embarrassing, see, eg, JC Campbell, 'The Purpose of Pleadings' (2004) 25(2) *Australian Bar Review* 116, 123–4.

leave to amend the original statements of claim and ordered the plaintiff pay the first defendant's costs.[80]

On this occasion, while exercising original jurisdiction, Mason J did not preside over a substantive trial carefully vetting complex issues of sovereignty but instead faced such questions in a procedural context. While judicial reasoning is understandably less fulsome at such an early stage, I would suggest that Mason J's decision was tainted by poor reasoning in three respects: applying the wrong test, eschewing common practice, and assuming a dismissive tone.

First, it is of some concern that Mason J failed to appreciate the distinction between amendments and strike outs, and in doing so, applied the wrong test. Under the *High Court Rules 1952* (Cth) that were effective at the time, the Court had a broad discretion to allow parties to amend proceedings 'at any stage of the proceedings … in such manner, and on such terms, as is just'.[81] However, this needed to be balanced with the further requirement that amendments be 'necessary' to determine 'the real questions in controversy'.[82] The Court also had the discretion to strike out pleadings under two distinct avenues.[83] On the one hand, that discretion could be exercised where a pleading was 'unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial'.[84] On the other hand, it could be exercised where a pleading 'does not disclose a reasonable cause of action' or is 'frivolous or vexatious'.[85] Despite electing to hear the plaintiffs' motion to amend but not the first defendant's motion to strike out, Mason J consistently relied on elements of the strike out test, such as 'embarrassing', contains 'no legal basis' and fails to 'assign a cause of action'.[86] This meant the correct test for amendments was not clearly applied.

Second, although of less concern, it is worth mentioning that Mason J subverted standard practice regarding the treatment of absent particulars. Generally, if the threshold requirement for amendment is met but necessary details are missing, the Court tends to grant an amendment so 'real questions' are identified when further particulars furnished.[87] Mason J did not adopt this practice but instead refused leave *because* the pleading lacked particulars, denying parties and the Court an opportunity to better understand the real questions in dispute.[88]

Finally, and partly due to its brevity, Mason J delivered a judgment with a tone that was dismissive and, at times, a touch imperious. For example, Mason J's 'fundamental objection' was that '*even* at this time' Aboriginal sovereignty

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80 *Coe First Instance* (n 58) 598. Costs generally follow the decision, but a more considered approach to costs was taken in *Thorpe* (n 1) 780 (Kirby J), where the position of the plaintiffs and the significant nature of these questions was recognised, even though the costs outcome was ultimately the same.

81 *HCR 1952* (n 71) ord 29 r 1(1).

82 Ibid ord 29 r 1(2). Note that this rule has since been amended and no longer contains the 'just' and 'necessary' tests: see *High Court Rules 2004* (Cth) rule 3.01.

83 *HCR 1952* (n 71) ord 20 r 29, ord 26 r 18. Both orders contain the modal verb 'may'.

84 Ibid ord 20 r 29.

85 Ibid ord 26 r 18.

86 *Coe First Instance* (n 58) 597–8. See ibid ord 20 r 29, ord 26 r 18, and associated discussion above at n 83.

87 Coe First Instance (n 58) 593 (Mason J). See also *Coe* (n 1) 408 (Gibbs J, Aickin J agreeing at 412), 409 (Jacobs J, Murphy J agreeing at 412).

88 See, eg, *Coe First Instance* (n 58) 596–7.

persists.[89] This condemnatory observation was reinforced by Mason J's decision to decline further particulars preventing closer engagement with diverse meanings of sovereignty. Another example is the manner in which a potential cause of action of native title was dismissed in one paragraph, which is a stark contrast to a later Court's careful engagement in *Mabo*. Mason J described native title as 'an irregular method of pleading' that is 'quite inappropriate' and 'most embarrassing', while erroneously describing native title as a claim for 'common law trespass, though … it is by no means clear to me' because 'much of the relief claimed seems to have little relevance to trespass'.[90]

On the basis of this limited and arguably, at times, poor reasoning, Mason J's first instance decision effectively ended proceedings early, which is a 'serious step' usually resulting from summary judgment or strike out.[91] Although the plaintiffs could have pursued the original pleading, they instead chose to appeal.[92]

C On Appeal

On appeal, four High Court Justices evenly divided. In short judgments, Jacobs J and Murphy J granted leave to amend, while Gibbs J and Aickin J denied leave.[93] Evenly divided decisions do not generate outcomes until a decision-making rule is applied.[94] Correctly applying the decision-making rule in section 23(2)(a) of the *Judiciary Act* affirmed Mason J's first instance decision to dismiss the plaintiff's application, meaning the plaintiffs were unable to amend their statement of claim. Despite arriving at different outcomes, the Court was unanimous the contentious issue was procedural and all agreed the appellate court faced a different procedural issue than at first instance.[95] As Jacobs J explained, because the question on appeal required finalisation, it was no longer possible to cleanly separate the appellant's application for leave to amend from the first respondent's application to strike out, as Mason J had attempted to do at first instance.[96] Competing applications were heard together and the Court agreed to approach the matter 'as if it were an application to strike out', therefore engaging rules not properly relevant at first instance.[97] Under the *High Court Rules 1952* (Cth) at the time, pleadings could be struck out where they were unnecessary, scandalous, prejudicial, embarrassing, or delayed a fair trial, except if they raised a substantial question sufficient to disclose

89 Ibid 595 (emphasis added).
90 Ibid 597–8.
91 *Thorpe* (n 1) 774–5 (Kirby J), where his Honour also wrote: 'If there is any doubt, a court should err on the side of allowing the claim to proceed. Evidence at trial may sometimes lend colour and strength to a claim.'
92 As Gibbs J commented on appeal, Mason J's 'order dismissing the application for leave to amend did not preclude the appellant from delivering another statement of claim': *Coe* (n 1) 409. Yet, Coe did not take up this opportunity, and as Jacobs J noted on appeal, the mere fact Coe applied for leave to amend suggests he did not want to pursue the original pleading: at 409.
93 Ibid 409 (Gibbs J, Aickin J agreeing at 412), 411 (Jacobs J, Murphy J agreeing at 412).
94 *Perara-Cathcart v The Queen* (2017) 260 CLR 595, 647 (Gordon J) ('*Perara-Cathcart*').
95 *Coe* (n 1) 404 (Gibbs J, Aickin J agreeing at 412), 409 (Jacobs J), 412 (Murphy J).
96 Ibid 409.
97 Ibid 409 (Jacobs J), 412 (Murphy J).

a reasonable cause of action.[98] While the Court has the discretion to strike out whole or parts of pleadings, this discretion becomes more limited in circumstances where a substantial question is present. On such occasions, the Court is only able to strike out the whole pleading if the 'objectionable matter is so closely intertwined with the other matter that the pleading as a whole may tend to embarrass the fair trial of the action'.[99]

The recognised procedural nature of the contentious issue limits any potential ratio decidendi on substantial topics, such as sovereignty, because legal principles must be in contention to gain precedential value.[100] As McHugh J in *Coleman v Power* wrote:

> Cases are only authorities for what they decide. If a point is not in dispute in a case, the decision lays down no legal rule concerning that issue … The case can have no wider *ratio decidendi* than what was in issue in the case. Its precedent effect is limited to the issues.[101]

The appellate court unanimously agreed the central issue was not a substantive question of sovereignty, but a preliminary matter of procedure that had changed from amendment at first instance to strike out on appeal. This restricts any potential ratio decidendi, but also raises questions about the precedential value a first instance decision, especially one focused on a different procedural issue, may have when used to resolve a divided appellate court.[102]

What actually divided the appellate court? Having agreed it was a procedural matter, reasons diverged on the proper weight to be afforded to identifying a cause of action when deciding to strike out an application, especially in a situation of absent particulars. Two judges held the pleading did disclose causes of action, including causes of action regarding sovereignty, doctrine of discovery, and native title, while two judges found it did not.

1 Allowing the Appeal: Jacobs J and Murphy J

In separate short judgments, Jacobs J and Murphy J allowed the appeal, striking out several paragraphs, and granting the plaintiff leave to amend the remainder.[103] Murphy J framed the revised issue as: 'notwithstanding the objectionable parts, whether any of the amended statement should be allowed to stand', recognising this 'puts a different complexion on the case' than at first instance.[104] For Jacobs J, the 'real question' on appeal was not the substantive issue of sovereignty, but a

98 Ibid 409 (Jacobs J). See also *HCR 1952* (n 71) ord 20 r 29, ord 26 r 18(1).

99 *Coe* (n 1) 409 (Jacobs J).

100 *Coleman v Power* (2004) 220 CLR 1, 44–5 (McHugh J) ('*Coleman*'). See also *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333, 346 (Kiefel CJ, Bell, Keane and Gordon JJ, Nettle J agreeing at 358); *CSR Ltd v Eddy* (2005) 226 CLR 1, 11 (Gleeson CJ, Gummow and Heydon JJ, Callinan J agreeing at 49).

101 *Coleman* (n 100) 44–5 (emphasis in original).

102 See Part V below for a discussion of the role Mason J's reasons played in resolving the divided appellate court, including any potential precedential value.

103 *Coe* (n 1) 411 (Jacobs J, Murphy J agreeing at 412).

104 Ibid 412.

more nuanced procedural question with the potential to end proceedings early.[105] Jacobs J clarified the significance of this change in procedural focus:

> But it is at this point that the Commonwealth's concession that the matter should be dealt with as an application to strike out the whole statement of claim has particular significance. If the application were to be treated simply as one for leave to amend, the Court in its discretion might require that the amendments be framed with a greater precision and particularity before the leave would be given. However, there is no discretion to strike out the whole of a statement of claim if it discloses a cause of action in the sense that it states matters which raise a question which ought to be determined. I have earlier stated the exception where all the allegations are so closely intertwined that the pleading as a whole is embarrassing. That is not this case. The paragraphs with which I have been dealing with are separate paragraphs which can be allowed to stand without any embarrassment.[106]

Both Murphy J and Jacobs J agreed the plaintiffs' statement of claim raised substantial questions sufficient to disclose several reasonable causes of action that 'could be heard and determined', as well as some objectionable matter that required striking out.[107] For these judges, the contentious issue was not whether the pleading included causes of action – as both agreed it did – but the more nuanced question of whether the acceptable aspects of the pleading were too intertwined with objectionable matter that they could not remain standing.[108]

On the doctrine of discovery as a potential cause of action, both judges accepted challenges to its domestic application in Australia were justiciable. The doctrine of discovery is an international legal framework of colonialism that authorises one nation to acquire sovereignty over lands of another, with different rules for when lands are conquered, ceded, or occupied through settlement.[109] In a rare move, Jacobs J and Murphy J accepted there were legitimate 'question[s] which would arise for determination', including the appropriate classification of the colonies making up Australia (conquest versus settlement) and challenges to the application of terra nullius.[110] More specifically, Murphy J held the 'extent to which the international law of occupation is incorporated in Australian municipal law is a question which would arise for determination in the proceedings'.[111] Jacobs J critiqued the 'view [that] has generally been taken that the Australian colonies were settled', and noted that while this was expressed in cases such as *Cooper v Stuart* and *Randwick Municipal Council v Rutledge*, there was 'no actual decision of this court or of the Privy Council to that effect' declaring Australian colonies were 'settled colonies'.[112]

Jacobs J accepted that deciding whether Australian colonies were conquered or settled territory ought to be determined, declining to strike out relevant paragraphs.[113]

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105 Ibid 409.
106 Ibid 411.
107 Ibid 412 (Murphy J, Jacobs J agreeing at 411).
108 Ibid 409 (Jacobs J, Murphy J agreeing at 412).
109 See Robert J Miller et al (eds), *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, 2010) <https://doi.org/10.1093/acprof:oso/9780199579815.001.0001>.
110 *Coe* (n 1) 411 (Jacobs J, Murphy J agreeing at 412).
111 Ibid 412.
112 Ibid 411, citing *Cooper v Stuart* (n 29) and *Randwick Municipal Council v Rutledge* (1959) 102 CLR 54 ('*Randwick Municipal*').
113 *Coe* (n 1), citing *Cooper v Stuart* (n 29) and *Randwick Municipal* (n 112).

Murphy J explored this potential cause of action further, recognising the 'wealth of historical material' supporting the plaintiffs' claim of prior occupation, including that Aboriginal laws 'were settled and of great antiquity', and that lands were not given up 'peacefully', but instead people were 'killed or removed forcibly', in what amounted to acts of 'attempted (and in Tasmania almost complete) genocide'.[114] Murphy J noted a 'cardinal condition' of occupation as a means of sovereign acquisition of territory is that territory 'should be terra nullius', and therefore 'peoples having a social and political organization cannot be of the nature terra nullius'.[115] Determining *Cooper v Stuart* as 'not binding on us', Murphy J critiqued this Privy Council decision as 'having been made in ignorance or as a convenient falsehood to justify the taking of [A]borigines' [sic] land', and accepted questions about the doctrine of discovery were sufficient to disclose a cause of action.[116]

On questions of sovereignty as potential causes of action, both judges recognised some conceptual complexity. Murphy J agreed 'generally with Jacobs J and with the order proposed by him' but offered little direct comment on sovereignty.[117] Jacobs J used the terminology of 'international sovereignty' existing 'adverse to the Crown' to interpret the first part of the pleading as 'generally' – but not exclusively – formulated as a claim of absolute sovereignty that is 'apparently' meant to dispute Crown sovereignty.[118] On this basis, Jacobs J distinguished between substantive questions of international law and their domestic application, deciding international courts were the correct forum to resolve such disputes because Australian courts unfairly benefit from the alleged wrong, flowing from the imposition of British sovereignty, and elected to strike out these aspects of the first part of the pleading.[119] Significantly, Jacobs J rejected the Commonwealth's argument the whole pleading was based on a version of absolute sovereignty as a denial of British then Australian sovereignty, noting that in the context of native title 'that cannot be correct', while also declining to strike out the third part based on the 'allegation the colony was conquered territory'.[120] In doing so, Jacobs J tacitly acknowledged additional non-adverse concepts of sovereignty present in the pleading. While striking out a version of absolute sovereignty, Jacobs J left open the possibility that other versions of sovereignty could disclose causes of action, such as modified sovereignty.

Further, there is a nexus between the doctrine of discovery and sovereignty making it difficult, if not impossible, to cleanly separate the justiciability of questions of sovereignty from discovery.[121] By accepting challenges to discovery as serious questions to be tried before the High Court, both Murphy J and Jacobs J necessarily accepted that at least some questions of sovereignty were justiciable. In

114 *Coe* (n 1) 412.
115 Ibid.
116 Ibid, citing *Cooper v Stuart* (n 29) and *Viro v The Queen* (1978) 141 CLR 88.
117 *Coe* (n 1) 412. Note that Murphy J only mentioned the word 'sovereignty' twice, both times in reference to British, not First Nations, sovereignty.
118 Ibid 410.
119 Ibid 409–10.
120 Ibid 411.
121 See, eg, Barker, 'For Whom Sovereignty Matters' (n 14) 4–5.

this respect, Murphy J recognised the possibility of absolute sovereignty forming a cause of action when accepting the 'plaintiff is entitled to endeavour to prove that the concept of terra nullius had no application in Australia' by challenging the acquisition of British sovereignty.[122] This possibility is further evident when Murphy J recognised the 'extent to which the international law of occupation is incorporated in Australian municipal law is a question which would arise for determination in the proceedings', which necessarily brings complex questions of sovereignty into consideration.[123]

To summarise this point, Jacobs J, with whom Murphy J agreed 'generally', accepted that questions of 'international sovereignty' were not capable of forming a cause of action, but remained open to other aspects of sovereignty, such as modified sovereignty.[124] In addition, while far from clear, it remains possible that Murphy J was in fact open to broader questions of sovereignty enmeshed with issues of discovery, including the justiciability of absolute sovereignty.

On questions of native title, both judges agreed the plaintiffs' challenge to the Federal Court's decision in *Milirrpum v Nabalco* had merit, while recognising it was not binding.[125] Murphy J acknowledged the 'difficulties' in framing a land rights claim but recognised Indigenous laws were 'settled and of great antiquity', and accepted they were 'capable of being formulated and presented in an intelligible way', which amounted to a reasonable cause of action.[126] Heralding what was to come in *Mabo*, Jacobs J recognised the substance of the plaintiff's native title claim was a common law entitlement to possessory or property rights.[127] While it was not raised in the 'neatest way', Jacobs J recognised native title is 'subject of no small body of authority', constituting a reasonable cause of action.[128]

Having accepted the pleading included several causes of action that ought to be determined, including native title, challenges to the domestic classification of Australian colonies under the doctrine of discovery and consequences of that classification, and at least some versions of modified sovereignty not adverse to the Crown, if not further, both Jacobs J and Murphy J agreed the threshold test was met, removing the Courts discretion to strike out the whole statement of claim. They also agreed that the exceptional scenario of intertwined material did not apply and that identifiable causes of actions were separable from any objectionable material to be struck out. Jacobs J reasoned minor matters like numbering 'gone awry', a lack of particulars in parts, and declarations not being in 'precise form', were capable of being remedied with leave to amend, and not fatal defects.[129] Murphy J also critiqued the form as 'irresponsible', describing aspects as 'partly frivolous'

122 *Coe* (n 1) 412.
123 Ibid.
124 Ibid 412.
125 Ibid 411 (Jacobs J, Murphy J agreeing at 412), citing *Milirrpum v Nabalco* (n 29).
126 *Coe* (n 1) 412.
127 Ibid.
128 Ibid 411. Cf the reference to 'trespass': at 408 (Gibbs J, Aickin J agreeing at 412). On possible relationships between possession and native title, see *Mabo* (n 1) 206–11 (Toohey J).
129 *Coe* (n 1) 410–11.

and 'badly drawn', especially political aspects in the fourth part of the pleading.[130] His Honour noted that failures in presentation did not satisfy the plaintiff's 'duty … to see that any claim is presented efficiently and responsibly', which was a failure that was exacerbated when a party 'claims to represent others'.[131] However, Murphy J looked beyond these minor issues in favour of larger concerns, acknowledging the High Court's role in resolving foundational questions and gross historical injustices such as genocide and terra nullius.[132]

2 Dismissing the Appeal: Gibbs J and Aickin J

With Aickin J in 'full agreement', Gibbs J delivered the most well-known judgment in this case.[133] Striking out the application and dismissing the appeal, in more familiar circumstances of a majority judgment, this would be considered the lead judgment. In a divided court, however, an interpretive emphasis on this – or any – judgment is ill-advised.[134] In a short six-page judgment, Gibbs J used over half his reasons to quote the amended statement of claim in full.[135] In a task described as 'not altogether easy', Gibbs J then reduced the claim into a seven point summary, with the first two being sovereignty.[136] In general terms, Gibbs J described the amended statement of claim as 'quite absurd', 'so clearly vexatious', and an 'abuse of process' despite being signed and argued by 'experienced counsel'.[137] Having considered dismissing the pleading in full for lacking a cause of action, Gibbs J accepted the Commonwealth Solicitor-General's concession to treat it as a strike out application, including the partial strike out of 'objectionable' material, and as a result considered whether any potential causes of action remained.[138] With greater severity than Jacobs J and Murphy J, Gibbs J critiqued the format, style, and numbering as 'marked by eccentricity', having immediately apparent 'deficiencies', being repetitive, confused, obscure, internally inconsistent, and failing to give essential particulars of land or legislation in question.[139]

On sovereignty as a potential cause of action, despite recognising the difficulty of pleading such a complex matter, Gibbs J immediately reached the conclusion that a sovereign Aboriginal nation challenging British sovereignty 'could not form the basis of any cause of action'.[140] In a significant passage, whose shadow has

130 Ibid 412, suggesting the 'political doctrine' aspect of non-justiciability may have been under consideration here.
131 Ibid.
132 Ibid.
133 Ibid 412 (Aickin J); 404–9 (Gibbs J).
134 While the section 23(2)(a) affirmation of Mason J's decision supported Gibbs J's dismissal to create an outcome, this affirmation did not create a majority or a lead judgment. For further discussion of this point, see Part V below.
135 *Coe* (n 1) 404–7. Note the judgment of Gibbs J in the Australian Law Reports version was printed across 12 pages, with the pleading taking about 6 pages: *Coe v Commonwealth* (1979) 24 ALR 118, 120–31.
136 *Coe* (n 1) 407–8.
137 Ibid 407.
138 Ibid.
139 Ibid.
140 Ibid 408.

dominated this field for too long, Gibbs J attempted to close the High Court's door on all questions of sovereignty.

> It is clear that the allegations … [of sovereignty] could not form the basis of any cause of action. The annexation of the east coast of Australia by Captain Cook in 1770, and the subsequent acts by which the whole of the Australian continent became part of the dominions of the Crown, were acts of state whose validity cannot be challenged: see *New South Wales v Commonwealth* (1975) 135 CLR 337, at p. 388, and cases there cited. If the amended statement of claim intends to suggest either that the legal foundation of the Commonwealth is insecure, or that the powers of the Parliament are more limited than is provided in the Constitution, or that there is an [A]boriginal nation which has sovereignty over Australia, it cannot be supported. ... The [A]boriginal people are subject to the laws of the Commonwealth and of the States or Territories in which they respectively reside. They have no legislative, executive or judicial organs by which sovereignty might be exercised. If such organs existed, they would have no powers, except such as the laws of the Commonwealth, or of a State or Territory, might confer upon them. The contention that there is in Australia an [A]boriginal nation exercising sovereignty, even of a limited kind, is quite impossible in law to maintain.[141]

In this formidable passage, Gibbs J took the view based on the act of state doctrine that the foundations of the Commonwealth are non-justiciable and cannot be challenged, and did so using an authoritative tone evidenced by phrases such as 'it is clear', 'cannot be supported', 'it is not possible', and 'quite impossible'.[142] On closer inspection, the reasons provided for this conclusion offer little by way of extended argument to make the case of why this might be so, and instead reveal several tensions. Consider three tensions present in this passage that, I suggest, indicate poor reasoning that might benefit from further explanation.

First, Gibbs J concluded challenges to the application of the doctrine of discovery were 'quite impossible'. In doing so, Gibbs J overlooked the fact it was clearly possible given two learned colleagues in the same case recognised challenges to discovery were plausible causes of action that amounted to serious questions to be tried.[143] In light of this possibility, further explanation is needed to maintain such a cause of action is not simply unlikely to succeed, but 'quite impossible'.

Second, and more seriously, Gibbs J collapsed the practical absence of historical treaties in Australia into a legal denial of the existence of First Nations sovereignty. Yet the historical fact of ongoing state failure to recognise sovereignty does not render First Nations sovereignty non-existent, but merely unrecognised by the settler state.[144] This reveals a tension about the appropriate source of sovereignty, potentially confusing inherent and delegated sources of authority.

Third, in this passage in particular, and throughout the judgment, Gibbs J relied on an assumed view of sovereignty as being limited to a very particular Westminster version of absolute sovereignty. Part of the complexity of sovereignty is that the form of sovereignty, including the manner it is exercised, does not define

141 Ibid.

142 Ibid. Cf Alderton (n 41) for a discussion of the uneasy relationship between the act of state doctrine and non-justiciability, including the compelling argument they should be considered separately.

143 *Coe* (n 1) 411 (Jacobs J, Murphy J agreeing at 412).

144 See, eg, discussion of the recent *Statewide Treaty* in Victoria, above n 19.

the concept.[145] As a concept, sovereignty is not reducible to a version of Westminster absolute sovereignty being exercised by executive, legislative, and judicial organs. To suggest the concept, form, and structure of First Nations sovereignty must include English and Australian organs exercising Westminster sovereignty reveals a tension in Gibbs J's assumed conceptualisation of sovereignty. Measuring First Nations sovereignty against a contemporary standard of Australian sovereignty (notably one the Court derives its authority from) reinforces a cultural bias that fails to recognise power imbalances between First Nations and the settler state, such as those present in the conceptualisation of the 'European term' sovereignty as only ever absolute.

The tensions present in this flawed and dated reasoning reveal Gibbs J's conclusion about the legal impossibility of First Nations sovereignty is arguably a fallacy. The challenge for any future High Court seeking to continue to rely on such reasoning is to reassess whether such reasoning should be maintained in current times, and if so, provide further and better explanation. As raised in the conclusion to this article, when the opportunity arises, the Court may wish to consider this issue afresh, which may or may not result in the Court arriving at a different position.

After this ambitious passage, Gibbs J addressed the remaining items in his summary, and concluded Australia was settled not conquered, and that the doctrine of discovery was not an 'issue fit for consideration' without providing reasons.[146] On potential causes of actions relating to land justice, Gibbs J saw no serious questions in arguments about unlawful dispossession, uranium mining on sacred sites or religious interference. Gibbs J accepted native title 'would be an arguable question if properly raised' but that on this occasion, because it was 'perfectly general' and lacked particulars, it was not arguable.[147] Unlike Jacobs J and Murphy J who recognised missing particulars could be remedied with leave, Gibbs J concluded the 'defects' went 'beyond a mere lack of particulars' and rejected the pleading as 'unarguable' because the 'greater part … discloses no cause of action, and is embarrassing'.[148] Despite the implicit recognition of a potential cause of action in native title, Gibbs J concluded without further explanation – including whether acceptable and objectionable matter was 'so closely intertwined' – that 'it is clear that *if* the amended statement of claim had been delivered without leave, the proper course would have been to strike it out'.[149]

Having dismissed the application, Gibbs J went on to comment that this 'heated controversy' raised 'serious legal questions' that need resolution, and provided the following incendiary advice: 'such questions … will not be assisted by imprecise, emotional or intemperate claims' and 'the claimants will be best served if their

145 See earlier discussion in Part II(B) above.
146 *Coe* (n 1) 408 (Gibbs J, Aickin J agreeing at 412).
147 Ibid 408.
148 Ibid. Cf at 411 (Jacobs J, Murphy J agreeing at 412).
149 Ibid 409 (Gibbs J, Aickin J agreeing at 412) (emphasis added).

claims are put before the court dispassionately, lucidly and in proper form'.[150] Evidencing further tensions, this advice was delivered by a future Chief Justice to an accomplished Wiradjuri leader and his First Nations colleagues, without seeming to account for any power differential, placing one set of leaders as appellant and another sitting in judgment as judiciary. Advising future claims may be possible when 'properly made' without recognising it is the Court that determines what is 'proper', reveals tensions around judicial reflexivity and judicial impartiality.[151] Such tensions are amplified by the use of contrasting terms such as 'emotional' and 'intemperate' to unsettlingly describe the current plaintiffs, in contrast to imagined future litigants who put their claims 'lucidly', 'dispassionately', and in 'proper form'.[152] These terms evoke imagery that is potentially expressive of 'stock stories', which 'reflect and reinforce dominant ideas' about race, gender, and class.[153] Conceivably embedded in this advice are stock stories and images of racialised stereotypes, which might imagine First Nations men as primitive, 'emotional', irrational, and violent (eg, current litigants) who are implicitly encouraged to assimilate into modern, rational, 'dispassionate', and impartial men (eg, white men), in order to 'properly' bring these questions before the Court as future litigants.

Gibbs J concluded this advice by reiterating: 'I have already indicated that there is no [A]boriginal nation, if by that expression is meant a people organized as a separate State or exercising any degree of sovereignty.'[154] Despite a lack of detailed reasoning, including several tensions, and an unexplained assumption about sovereignty, this final comment has been relied on by later courts as if it carried precedential value representing the position of an evenly divided Court.[155] This is incorrect.

3 What Divided the Divided Court?

While the court divided in outcome, all four judges agreed the central legal issue was whether to strike out the pleading. All agreed this was different to the issue of amendments at first instance requiring the application of a different legal test. Drawing attention to the significance of this change, Murphy J recognised if the appeal was based on a question of amendment, a different result may have occurred. Significantly, all four judges agreed the nature of the matter was procedural and not a substantive issue of sovereignty. However, in the context of this agreed procedural matter of a strike out, reasoning diverged on the proper weight to be afforded to identifying causes of action in the absence of particulars.

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150 Ibid. The recognition of 'serious legal questions' means the non-justiciability is not being used in the sense of the 'political questions' doctrine, but likely serves as a 'conclusory label': see Kirk (n 7) 515–19.

151 See generally Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias* (Report No 138, December 2021).

152 *Coe* (n 1) 409 (Gibbs J).

153 See, eg, Lisa Sarmas, 'Storytelling and the Law: A Case Study of *Louth v Diprose*' (1994) 19(3) *Melbourne University Law Review* 701.

154 *Coe* (n 1) 409 (Gibbs J, Aickin J agreeing at 412).

155 See, eg, *Love* (n 1) 200–1 [102] (Gageler J).

On native title as a potential cause of action, all four judges agreed native title could constitute a cause of action. They also agreed the pleading lacked particulars, but placed different emphasis on the lack of particulars. Gibbs J and Aickin J found the lack of native title particulars meant this aspect should be struck out despite the potential cause of action. Based on common practice, Jacobs J and Murphy J reached the opposite conclusion, reasoning the opportunity to furnish further particulars could clarify the cause of action and the nature of the dispute between parties, thus providing grounds to decline to strike out in this respect.[156]

Reasoning diverged more broadly on whether potential causes of action based on sovereignty and the doctrine of discovery were vulnerable to strike out. Gibbs J and Aickin J found all issues of sovereignty and discovery did not form causes of action, but Jacobs J and Murphy J found various aspects did. Jacobs J held some issues of sovereignty, namely claims of 'international sovereignty', did not form a cause of action. Unlike Gibbs J and Aickin J, Jacobs J remained open to other aspects of sovereignty serving as serious questions to be tried, such as issues of modified sovereignty implicitly raised in later parts of the pleading, as well as those present in the doctrine of discovery. More specifically, Jacobs J regarded the acquisition of British sovereignty, appropriate classification of colonies, and legal consequences of a wrong classification – all issues inseparable from questions of sovereignty – as potential causes of action. Murphy J also accepted challenges to British acquisitions of sovereignty were justiciable, including challenges to terra nullius, classifications made under the doctrine of discovery, and consequences flowing from British acquisition. While silent on the explicit question of First Nations sovereignty, Murphy J agreed 'generally' with Jacobs J, meaning at a minimum, Murphy J also accepted the justiciability of questions of modified sovereignty. Whether Murphy J agreed with Jacobs J on 'international sovereignty' or remained open to broader issues of sovereignty is unclear but remains a possibility.

To summarise, the Court agreed the procedural nature of the central issue had changed on appeal requiring the application of a different legal test. The Court agreed native title could constitute a cause of action, but was equally divided on whether sufficient particulars were furnished on this occasion. The Court was also equally divided on whether the doctrine of discovery raised serious questions to be tried. On the polemical issue of sovereignty, the Court's ultimate position is less self-evident, and largely depends on how the judgments of Jacobs J and Murphy J are interpreted. While Gibbs J and Aickin J were clear no issues of sovereignty could form causes of action, Jacobs J and Murphy J refrained from taking an unqualified position. At most, either the Court as a whole or a majority of three (excluding Murphy J) agreed the topic of 'international sovereignty', a form of absolute sovereignty, did not constitute a cause of action. The Court equally divided on the justiciability of modified sovereignty, the doctrine of discovery, and the relationship between sovereignty and discovery.

156 On the intersection between non-justiciability and native title in the High Court, which is often imagined as delineating through the act of state doctrine, see *Mabo* (n 1) 15 (Mason CJ and McHugh J), 31–2 (Brennan J, Mason CJ and McHugh J agreeing at 15), 78–9 (Deane and Gaudron JJ); *Yorta Yorta* (n 1).

Therefore, the position that *Coe* stands for, or contributes to – the principle that *all* questions of First Nations sovereignty are non-justiciable – is unsustainable. As the foregoing analysis demonstrates, the Court addressed substantive questions of sovereignty, discovery, and native title within the pre-trial confines of a procedural matter. Without the benefit of receiving detailed submissions from parties or the opportunity to ventilate complex issues through a full hearing, fundamental issues such as the range of meanings attached to sovereignty, including but not limited to absolute and modified sovereignty, were not fully explored. As a result of these limitations, the decision of *Coe* produced poor reasoning – and it was delivered by an evenly divided court delivering divided reasoning. While section 23(2)(a) generated an outcome finalising rights between the parties, an outcome is not equivalent to a ratio decidendi.

What precedential value, if any, does this evenly divided decision now hold? To answer this question requires considering the relationship between the doctrine of precedent and evenly divided judgments. Amongst other issues, does Mason J's first instance decision carry any precedential value *on appeal* due to its role in resolving the appellate stalemate?

V THE CHALLENGE OF EVENLY DIVIDED COURTS

The challenge created by evenly divided judicial decisions is not unique to Australia, and has been approached differently throughout the common law world.[157] Balancing the need to produce outcomes for parties with the important role superior courts play in developing common law, superior courts throughout the former British Empire have generally taken the position that decisions by evenly divided courts have no binding precedential authority. As Brett MR of the English Court of Appeal in *The Vera Cruz [No 2]* ('*The Vera Cruz*') explained:

> It was the custom for each of the Courts in Westminster Hall to hold itself bound by a previous decision of itself or of a Court of co-ordinate jurisdiction. … But when a Court is equally divided this comity does not exist, for there is no authority of the Court as such, and those who follow must choose one of the two adverse opinions. And … when a Court is equally divided, if the case comes before it again, it will exercise an independent opinion and abide by one of the two views.[158]

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157 See, eg, 'Equal Division of Appellate Courts' (1949) 22(12) *Australian Law Journal* 549; 'Equal Division of the High Court' (1948) 22(5) *Australian Law Journal* 205; 'The High Court Equally Divided' (1939) 13(5) *Australian Law Journal* 214; Thomson Reuters, *High Court Practice* (online at 9 October 2025) [JUD23.60]; JT Irvine, 'The Case of the Evenly Divided Court' (2001) 64(1) *Saskatchewan Law Review* 219; Ryan Black and Lee Epstein, 'Recusals and the "Problem" of an Equally Divided Supreme Court' (2005) 7(1) *Journal of Appellate Practice and Process* 75; William L Reynolds and Gordon G Young, 'Equal Divisions in the Supreme Court: History, Problems, and Proposals' (1983) 62(1) *North Carolina Law Review* 29.

158 (1884) 9 PD 96, 98 ('*The Vera Cruz*'). In *The Vera Cruz* (n 158), the English Court of Appeal was faced with interpreting its own earlier evenly divided decision, which a lower court judge had subsequently considered binding: at 98 (Brett MR, Bowen LJ agreeing at 100). The Court agreed they were not bound and that the question remained open: at 98 (Brett MR, Bowen LJ agreeing at 100), 101 (Fry LJ). See also *The Franconia* (1877) 2 PD 163. Note that *The Vera Cruz* (n 158) was endorsed by Dixon J in *Tasmania v Victoria* (1935) 52 CLR 157, 184–5 ('*Tasmania v Victoria*').

As *The Vera Cruz* made clear, evenly divided courts create 'no authority of the Court as such' due to a lack of judicial comity.[159]

Coe is not the only evenly divided High Court decision. In fact, evenly divided courts occur surprisingly often.[160] While appellate courts usually sit with an uneven number of judges to ensure a majority decision, unexpected events like death, illness, retirement, or conflict of interest may reduce courts to an even number. On these occasions, courts risk failing to deliver a majority decision. Despite this risk, the High Court sat with a permanent court of 6 judges for 13 years throughout the Great Depression and World War II.[161] During this period, a 'disturbingly large' number of equally divided decisions occurred.[162] The unintended upside of this period was the development of highly instructive jurisprudence on the precedential value of evenly divided decisions.[163]

The High Court has long been transparent that their evenly divided decisions do not create binding precedent.[164] When faced with one of its own prior divided decisions, the Court is free to deliver independent opinions.[165] Of course, the High Court is the apex court and always free to deliver independent decisions, regardless of whether its prior decision was unanimous, majority, or divided.[166] Yet evenly divided judgments provide a distinct challenge. While unanimous and majority High Court judgments generate precedent that bind lower courts but not itself, evenly divided decisions fail to bind later High Courts not simply because they are

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159 *The Vera Cruz* (n 158) 98. Judicial comity is the 'principle that, out of deference and respect, the courts in one state or jurisdiction will give effect to the laws and judicial decisions of another': *A Dictionary of Law* (10th ed, 2022) 'judicial comity'. Furthermore, '[n]on-observance of comity does not give rise to strict legal consequences; however, the state affected by the non-observance may reciprocate by retracting its own courteous practices': *LexisNexis Concise Australian Legal Dictionary* (6th ed, 2021) 'comity'.

160 See, eg, *Aristocrat Technologies Australia Pty Ltd v Commissioner of Patents* (2022) 274 CLR 115; *Queensland v Congoo* (2015) 256 CLR 239; *Monis v The Queen* (2013) 249 CLR 92. See generally 'The High Court Equally Divided' (n 157) 214; 'Equal Division of the High Court' (n 157) 206.

161 The High Court initially had three Justices when it was first established in 1901, which was increased to five and then seven in 1912. During the Great Depression, a vacancy created by the 1931 retirement of Isaacs CJ was not filled due to financial constraints, which left the High Court with a court of six rather than seven Justices. Despite objections, the seventh seat was not filled and in 1933 the full court was formally reduced to six Justices by amendments to the *Judiciary Act*. In 1946, after 15 years of sitting with six Justices, a full court of seven Justices was restored. While factors such as the ending of World War II and the Great Depression were relevant, and the end of a perceived workload reduction during this time, also a factor were the increasingly high number of equally divided decisions causing problems. The Supreme Court of Canada also had six Justices during its first 50 years (1875–1926), before it was increased to seven Justices then its current nine Justices in 1947.

162 'The High Court Equally Divided' (n 157) 214.

163 Ibid. Note scenarios of evenly divided reasons (cf outcome) is a distinct issue of *stare decisis* beyond the scope of this article.

164 See *Tasmania v Victoria* (n 158); *Western Australia v Hamersley Iron Pty Ltd [No 2]* (1969) 120 CLR 74 ('*Hamersley Iron [No 2]*'); *Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd* (1981) 146 CLR 336 ('*St Helens Farm*'); *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 ('*Re Wakim*'); *Perara-Cathcart* (n 94).

165 Note that there is a related but distinct question of the relationship between evenly divided High Court decisions and their influence in lower courts that is beyond the parameters of this article.

166 On the High Court's status as the apex court, see Kristen Walker, 'Authority of the High Court of Australia' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018).

the apex court never bound, but because there is no majority of reasons capable of generating binding precedent for any future court. It is this secondary reason – the lack of a majority of reasons – which needs be scrutinised to properly understand how best to interpret *Coe*.

Although evenly divided High Court judgments do not generate binding authority, the circumstances of individual parties, like those in *Coe*, are governed by section 23(2) of the *Judiciary Act*, which generates an outcome by court order. A century of consistent jurisprudence interprets section 23(2) court orders as resolving immediate disputes, but providing no further precedential guidance for future parties. Despite occasional use of potentially ambiguous terms like 'statutory majority', section 23(2) generates a majority of outcome but not a majority of reasons. In this Part, I differentiate court orders from judicial reasons by first addressing how immediate disputes are resolved through outcomes, before considering the precedential value of evenly divided reasoning.[167]

A Court Orders Resolving Evenly Divided Decisions

To state the obvious, equally divided courts mean it is unclear who has succeeded. Without a majority, courts cannot generate an order allowing or dismissing an appeal, and akin to a hung jury, a 'hung court' is created.[168] To resolve this problem, Gordon J explained in *Perara-Cathcart v The Queen* ('*Perara-Cathcart*') 'an expedient must be adopted by the court to dispose of the case and give effect to, and conclude, the parties' legal rights'.[169] For the High Court, the 'expedient' is section 23(2) of the *Judiciary Act*. The main pathway in section 23(2)(a) creates an outcome by affirming the decision appealed from. An alternate pathway in section 23(2)(b) governs 'any other case' by declaring the decision of the Chief Justice (or most senior Justice) prevails. Whichever pathway applies, section 23(2) resolves the 'hung court' by generating a court order to conclude parties' rights.

In *Coe*, the correct application of section 23(2) applied section 23(2)(a) to affirm Mason J's decision and dismiss the appeal. Unfortunately, as evident in interpretations of *Coe*, there is some confusion about the scope of paragraphs (a) and (b) in section 23(2). At times, paragraph (a) is wrongly limited to appellate jurisdiction matters and paragraph (b) wrongly expanded to original jurisdiction matters. However, paragraph (a) explicitly applies to both appellate *and* original jurisdiction appeals by including appeals from 'a Justice of the High Court', which is where original jurisdiction matters – like *Coe* – generally start. But whose responsibility is it to apply section 23(2)?

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167 For a good discussion of the important distinction between orders and reasons, albeit in a different context, see Kristen Walker, 'When Can a Court's Decision be Ignored?' (2022) 46(2) *Melbourne University Law Review* 572.

168 The first words of section 23(2) make it clear that when the full court is divided in opinion, the question must be decided according to the majority. However, where there is no majority, sections 23(2)(a) and (b) resolve the impasse.

169 *Perara-Cathcart* (n 94) 647 [153]. Likewise, Gageler J in the same case refers to this as the 'decision-making rule': at 622 [75]. For alternative expedients used elsewhere in the British Empire, including the junior Justice withdrawing their judgment or the appeal automatically failing, see *Tasmania v Victoria* (n 158) 183–4 (Dixon J).

Interestingly, in evenly divided cases such as *Coe*, it is not the responsibility of the Court. While the Court is required to interpret and apply relevant legislation at issue in a case, section 23(2) only becomes relevant after judgment is delivered. This is because judges have an individual duty to deliver judgment but do not have a collective duty to deliver majority outcomes.[170] Where the Court does equally divide, the decision-making rule in section 23(2) comes into play *after* judges have exercised their duty to deliver judgment. As a result, judicial silence on the correct application of section 23(2) by a Court that delivers a divided judgment is common, and it therefore falls to the wider legal community to initiate interpretation.[171] Often a first pass at interpretation falls to publishers of cases, especially headnote authors.

Headnotes are written by anonymous expert reporters who are generally practicing barristers of high distinction, led by an editor or co-editors.[172] The Commonwealth Law Reports ('CLR'), as the authorised report, is checked by the High Court before publication to ensure accuracy, including the correct application of section 23(2). However, *Coe* was not published in the CLR. Highly regarded unauthorised reports such as the Australian Law Reports ('ALR') and Australian Law Journal Reports ('ALJR') both published *Coe* but were not approved by the Court. Confusingly, two headnotes in *Coe* applied section 23(2) differently. The ALJR headnote correctly applied paragraph (a) to affirm Mason J's decision, but the ALR headnote incorrectly applied paragraph (b), claiming Gibbs J's decision prevailed.[173] This had little consequence on this occasion as both headnotes correctly concluded the appeal was dismissed. However, what is of concern, and indicative of the wider misunderstanding of *Coe* that followed, is that both headnotes interpreted section 23(2) as offering more than a mere resolution of outcome through court order. As explored in the next section, both incorrectly elevated Gibbs J and Aickin J to 'statutory majority', and relegated Jacobs J and

170 *Perara-Cathcart* (n 94) 621–2 [73]–[75] (Gageler J), cited in Hamer et al (n 52) 226–7 [7.41].

171 Note that there is an exception: *Ord Forrest Pty Ltd v Federal Commissioner of Taxation* (1974) 130 CLR 124, 125–36 (Stephen J) ('*Ord Forrest*'), attaching the full decision of *Ord Forrest Pty Ltd v Federal Commissioner of Taxation* (1973) 47 ALJR 193 (Stephen J) ('*Ord Forrest First Instance*').

172 For example, headnotes for the Commonwealth Law Reports, which is the authorised report for the High Court, are written by a select group of reporters, 'comprising Vinerian Scholars, Rhodes Scholars, prize winners from Australian universities, former associates of High Court Justices, and other young barristers of high distinction'. The editors are appointed from this group of reporters, and only seven editors have been appointed since 1903. Notably, James Meralls AM QC served as the editor for 47 years – 'almost half the entire life of the Court': see Libby Hakim, 'A New Age for the Commonwealth Law Reports', *Thomson Reuters Legal Insight* (Web Page, 19 April 2017) <https://insight.thomsonreuters.com.au/legal/posts/a-new-age-for-the-commonwealth-law-reports>. The current co-editors are Dr Paul Vout KC and Peter G Willis SC: see 'Dr Paul Vout KC', *Victorian Bar* (Web Page) <https://www.vicbar.com.au/Web/Web/Account/Barrister-Profile.aspx?ID=23699>; 'Peter G Willis SC', *Victorian Bar* (Web Page) <https://www.vicbar.com.au/Web/Web/Account/Barrister-Profile.aspx?ID=23214>. To be clear, because headnotes are written by a reporter (cf the Court), it does not form part of judicial reasoning and is only useful as a secondary material that is not binding in any way.

173 Note High Court of Australia, *Practice Direction No 1 of 2019: Legislation and Authorities*, 5 August 2019, para 4, where the authorised report is required when cases are handed up in the joint book of authorities. Interestingly, a footnote says the CLR as the authorised report is required, but if not, the ALJR is preferred: at para 4 n 1.

Murphy J to 'statutory dissent', wrongly implying section 23(2) created a majority of reasons capable of generating authority under the doctrine of precedent.

Confusion surrounding section 23(2) is not limited to authors of headnotes, as evident in Mason CJ's engagement with this aspect of *Coe* in the first instance judgment in *Coe (on behalf of the Wiradjuri)*:

> Mr Searle sought to derive some support [on sovereignty] from the judgments of Murphy and Jacobs JJ in [*Coe*]. In that case, on an appeal from an order which I made refusing leave to amend the plaintiff's statement of claim, the Court divided equally on the question whether the statement of claim should be amended. Consequently, pursuant to s 23(2)(b) of the *Judiciary Act 1903* (Cth), my decision was affirmed.[174]

Mason CJ made several errors applying section 23(2). First, his Honour wrongly applied paragraph (b) instead of paragraph (a). Second, even if paragraph (b) did apply to *Coe*, which it did not, Gibbs J's decision would prevail (not Mason J's) because in the absence of Barwick CJ, Gibbs J was the most senior justice present. Third, even if Mason J had been the most senior justice present, which he was not, Mason J was not a member of the appellate court, so his first instance decision could not prevail on appeal as it was not part of the appeal but procedural history. Fourth, while his Honour correctly identified Mason J's first instance decision was 'affirmed', this can only arise by applying paragraph (a), not paragraph (b). Fifth, while his Honour correctly recognised the Court divided equally on a procedural issue, Mason CJ incorrectly described the procedural issue on appeal as amendment, not strike out. Finally, touching on the broader issue of precedential value, Mason CJ suggested the judgments by Murphy J and Jacobs J were not able to be relied upon in argument, seemingly characterising them as akin to dissent, while implying Gibbs J, Aickin J and Mason J somehow constituted a majority on appeal, despite Mason J sitting at first instance.

Statutory interpretation matters. As former High Court Justice Michael Kirby writes, statutory interpretation is 'an art, not a science', which makes it 'an activity that is challenging, interesting and important for the content, application and future of the law'.[175] Deficient interpretations and applications of section 23(2) are potentially misleading. In *Coe*, any interpretative errors had no practical consequences because the outcome under paragraph (a) or (b) was the same. However, there is no guarantee a lower court decision (affirmed by paragraph (a) – here, Mason J) and a senior judge (prevailed by paragraph (b) – here, Gibbs J) agree. Different outcomes are possible. If section 23(2) did generate a 'statutory majority', as both headnotes in *Coe* suggest, then the correct application of paragraphs (a) or (b) creates differently constituted majorities of reasons, which alters any potential ratio. Thus, when Mason CJ in *Coe (on behalf of the Wiradjuri)* cited *Coe* to rely on Mason J (at first instance) and Gibbs J (on appeal with Aickin J agreeing) to constitute a majority of reasons, but ignored

174 *Coe (on behalf of the Wiradjuri)* (n 1) 114.

175 Michael Kirby, 'Statutory Interpretation: The Meaning of Meaning' (2011) 35(1) *Melbourne University Law Review* 113, 132, 118. See generally Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis, 10th ed, 2024).

Murphy J and Jacobs J,[176] this poses the question: what is the precedential status of judicial reasoning in evenly divided courts?

B The Precedential Status of Judicial Reasoning in Evenly Divided Courts

The accepted starting point in Australia for the general rule on the status of judicial reasoning in evenly divided courts is Dixon J and Rich J in *Tasmania v Victoria*, where both held that the evenly divided decision of the High Court in *Ex parte Nelson [No 1]* was not binding.[177] After surveying how different common law appellate courts resolved this problem, Dixon J held that for the High Court:

> As the Court was equally divided [in *Ex parte Nelson [No 1]*] the case is not, I think, a binding authority. Where the members of a Court are equally divided in opinion … the decision so arrived at does not, in my opinion, become a precedent which in this Court has authority.[178]

In the same case, when considering the authority of *Ex parte Nelson [No 1]*, Rich J wrote: 'The decision was given upon an equal division of opinion in the Court and is not a precedent which according to the rule adopted by the Court of Appeal in England is binding upon the Court in subsequent cases.'[179] As a wartime decision, Dixon J and Rich J were part of a six-member court, and did not form a majority in *Tasmania v Victoria* on this issue. However, their position that equally divided courts do not create binding authority has since been approved by subsequent High Court decisions, including unanimous ones.[180] Applying this principle to *Coe*, it becomes apparent that the leading case of *Coe* did not – and could not – create binding authority.

Interpreting equally divided judgments as having no binding authority means important, complex, and urgent questions, such as the justiciability of complex questions of First Nations sovereignty, remain unresolved for future parties. When the federal Parliament eventually reinstated seven judges to the High Court in 1946, Attorney-General Evatt spoke aptly:

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176 *Coe (on behalf of the Wiradjuri)* (n 1) 114.

177 *Tasmania v Victoria* (n 158) 183–5 (Dixon J), 173 (Rich J), referring to *Ex parte Nelson [No 1]* (1928) 42 CLR 209. See, eg, *Royal Sydney Golf Club v Federal Commissioner of Taxation* (1955) 91 CLR 610. See also Brian Opeskin, 'Cross-Vesting of Jurisdiction: Alive but Not Well' (1998) 16(3) *Companies and Securities Law Journal* 207, 210; 'Equal Division of the High Court' (n 157); 'The High Court Equally Divided' (n 157); 'The *Sodeman Case* and the Defence of Insanity' (1936) 10(1) *Australian Law Journal* 3, 4; Nicholas Aroney, 'The Constitutional Demise of the Cross-Vesting Scheme' (1999) 7(3) *Insolvency Law Journal* 116, 118; Charles Magoffin, 'The Australian Court System and the Demands of Federalism: *Gould v Brown* and the Constitutional Issues Raised by the Cross-Vesting Scheme' (1998) 20(2) *Sydney Law Review* 329, 333.

178 *Tasmania v Victoria* (n 158) 183.

179 Ibid 173.

180 Many cases have since explicitly used the rule stated by Dixon J in *Tasmania v Victoria* (n 158) 183–5, including a unanimous court in *Hamersley Iron [No 2]* (n 164) 82–3 (Kitto J), 85 (Menzies J). See also *St Helens Farm* (n 164) 430–2 (Aickin J); *Re Wakim* (n 164) 548 [33] (McHugh J), 571 [101] (Gummow and Hayne JJ); *Perara-Cathcart* (n 94) 622 [76] (Gageler J), 648 [160] (Gordon J); *Helmbright v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [No 2]* (2021) 287 FCR 109, 161 [253] (Mortimer J). As pointed out by Dixon J in *Tasmania v Victoria* (n 158) 185, the same rule is present in most common law courts.

> Even if the interests of the immediate parties concerned are left out of consideration, the only conclusion possible in this matter is that equal division is an evil. The majority … are cases of considerable public importance … The confusion is considerable. Not only the lawyer but through him the lawyer-seeking public are placed upon, the horns of a dilemma, a position of no little irritation and discomfort.
>
> A decision of the High Court where there is an equal division is not a precedent binding upon the Court in a subsequent case .[181]

The Court has not shied away from recognising these difficult consequences, and addressed this 'dilemma' in *Western Australia v Hamersley Iron Pty Ltd [No 2]*, when it unanimously affirmed the position of Dixon J and Rich J in *Tasmania v Victoria* that evenly divided courts are not binding despite the undesirable consequences of ongoing uncertainty.[182] More specifically, the Court unanimously held that an evenly divided court was not grounds to authorise an appeal to the Privy Council.[183] Kitto J recognised the lack of judicial authority in divided decisions left 'an important general question unresolved and its difficulty underlined'.[184] Menzies J remarked that constitutional law is not static and constitutional problems are rarely resolved in 'one blow'.[185] Thus, the important questions raised in *Coe* concerning sovereignty, discovery, and native title remained unresolved for future parties despite the inconvenience caused. While native title has since been addressed by the judiciary, most recently in the 2025 decision of *Commonwealth of Australia v Yunupingu*,[186] questions of sovereignty and discovery endure as matters largely untouched by the Court.

Though the Court has been resoundingly clear that evenly divided judgments do not create precedent despite adverse consequences, could or should there be an exception for original jurisdiction matters like *Coe*? Some have argued the precedential authority of evenly divided decisions in their original jurisdiction should be treated differently to appellate decisions, given their inherent importance. This potential exception was comprehensively addressed in *Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd* ('*St Helens Farm*'), which was decided two years after *Coe*.[187] In *St Helens Farm*, a 4:2 High Court majority rejected this

181 Commonwealth, *Parliamentary Debates*, House of Representatives, 29 March 1946, 808 (Herbert Vere Evatt, Attorney-General). Evatt (1894–65) was a Justice of the High Court of Australia from 1930–40. Note that Webb J was appointed as the new seventh judge in 1946.

182 *Hamersley Iron [No 2]* (n 164). Unusually, the High Court explained why its prior court in the evenly divided decision in *Western Australia v Hamersley Iron Pty Ltd [No 1]* (1969) 120 CLR 42 ('*Hamersley Iron [No 1]*') sat with an even court. On that occasion in *Hamersley Iron [No 1]* (n 182), Taylor J died before judgment, having written a draft joint judgment with the Chief Justice. Recognising the consequences were not ideal but unavoidable, the High Court in *Hamersley Iron [No 2]* (n 164) correctly applied section 23(b) as there had been no prior decision by any court, including the High Court in *Hamersley Iron [No 1]* (n 182), so the decision of the Chief Justice prevailed.

183 More specifically, there were no grounds for a 'special reason' to issue a certificate under section 74 of the *Australian Constitution* authorising an appeal to the Privy Council.

184 *Hamersley Iron [No 2]* (n 164) 85.

185 Ibid 86.

186 (2025) 99 ALJR 519.

187 *St Helens Farm* (n 164). Note that while assessing the precedential authority of the evenly divided decision of *Ord Forrest* (n 171), which was a decision on appeal from a single High Court Justice in its original jurisdiction, a 4:2 majority in *St Helens Farm* (n 164) held *Ord Forrest* (n 171) was not binding. In doing so, the majority endorsed Dixon J in *Tasmania v Victoria* (n 158), Kitto J and Menzies J in

argument, finding the jurisdictional source of the appeal irrelevant to its lack of precedential status.[188] For *Coe*, its status as an original jurisdiction matter does not carve out an exception to the general rule that evenly divided courts fail to create binding precedent, regardless of any adverse consequences flowing from doctrinal uncertainty on important questions such as sovereignty.

Bringing this cogent jurisprudence on the precedential status of divided decisions together with my earlier discussion of orders generated under section 23(2), it is helpful to address the expression 'statutory majority' present in, amongst others, *St Helens Farm* and the headnotes of *Coe*.[189] Do statutory majorities created under section 23(2) for the purpose of generating an order have any special, binding status under the doctrine of precedent? The clear answer is no. The High Court in the cross-vesting case of *Re Wakim; Ex parte McNally* ('*Re Wakim*') held judicial reasons by statutory majorities do not have any 'special status' because evenly divided decisions create no legal principle, authority, or precedent.[190] More specifically, Gummow and Hayne JJ in *Re Wakim* upheld Dixon J's rule in *Tasmania v Victoria* in deciding there was no need to 'reconsider' or 'reopen' the prior evenly divided High Court decision of *Gould v Brown* ('*Gould*') because it contained no majority.[191] Their Honours noted that while an order was generated by section 23(2) to resolve the matter for parties, the case of *Gould* created no majority and 'established no principle or precedent having authority in this Court'.[192] Therefore, if the High Court were to face similar questions as those raised in *Coe*, there would be no need to reopen or reconsider *Coe* because it contained no majority, and therefore did not establish any principle or precedent.

One final comment is needed to clarify the language of 'statutory majority', which risks blurring the crucial distinction between orders and reasons necessary to understand the precedential status of evenly divided decisions. Recently in *Perara-*

Hamersley Iron [No 2] (n 164), and Barwick CJ *Milne v Federal Commissioner of Taxation* (1976) 133 CLR 526 ('*Milne*'), with Aickin J emphasising it was 'well settled' that evenly divided decisions were not binding: at 430. Note also that one complication of *Ord Forrest* (n 171) 125–36, was that *Ord Forrest First Instance* (n 171) was published as part of a very long appellate headnote.

188 *St Helens Farm* (n 164), with the majority holding appeals concerning evenly divided decisions from the Supreme Court, Federal Court, and from single judge decisions of the High Court were to be treated alike: at 348 (Barwick CJ), 364–5 (Stephen J), 430 (Aickin J), 445 (Wilson J). Cf dissenting opinions of Mason J and Gibbs J. Gibbs J was of the view that the High Court's earlier evenly divided decision in *Ord Forrest* (n 171) was binding because the appeal was from a single High Court judge in the Court's original jurisdiction: at 354–5. Gibbs J noted the High Court practice of allocating only four, rather than five, judges to such appeals, arguing this practice assumed that where necessary, first instance judges are 'elevated' to the appeal as the 'deciding' fifth judge. Mason J took a different approach. Rather than arguing for an original jurisdiction exception, Mason J pushed back against the general rule that evenly divided courts create no authority, and was of the view that *Ord Forrest* (n 171) was binding on lower courts but not the High Court. Mason J emphasised the general rule that the High Court is not bound by its past decisions, and noted the High Court 'ordinarily' follows its previous decisions unless there is 'some special reason', and that an evenly divided court in and of itself does not constitute a special reason: at 369–70.

189 In dissent, both Mason J and Gibbs J interpreted section 23(2) as creating an effective majority in *Ord Forrest* (n 171): *St Helens Farm* (n 164) 369–70 (Mason J), 354–5 (Gibbs J).

190 *Re Wakim* (n 164) 571 [101] (Gummow and Hayne JJ).

191 Ibid 570–1 [100].

192 Ibid 571 [100], discussing *Gould v Brown* (1998) 193 CLR 346.

Cathcart, the High Court authoritatively distinguished court orders from the more abstract 'principles of law' generated through the interpretation of reasons for judgment, including ratio decidendi and obiter dicta. Returning to first principles, in this case, Gageler J emphasised courts 'unique and essential function' to resolve disputes according to their 'true view', recognising the decision-making rule in section 23 helps fulfil the institutional duty to resolve disputes, by delivering outcomes for parties when the 'true view' is divided.[193] Gageler J made the important observation that orders and ratios are different in time, concept, and purpose, and offered the reminder that every case must have an outcome, but not every case has a ratio.[194] Nettle J and Gordon J also emphasised the distinction between orders and reasons. They both concluded evenly divided courts have no binding ratio, and that it is not possible to aggregate different reasons, or elevate reasons over court orders to generate legal authority for an evenly divided case producing no initial outcome.[195] Revisiting *Coe* in light of this recent guidance in *Perara-Cathcart*, the Court's warning not to elevate reasons over orders makes it clear that section 23(2) enables an order but does not give the reasons delivered in judgments – here Mason J, Gibbs J, and Aickin J – a 'special status' generating legal principles. In other words, it is not possible to resort to the court below to identify the reasoned principles of law established on appeal to create legally binding authority. Any 'statutory majority' in *Coe* is simply a majority of outcome and not a majority of reasons.

Therefore, evenly divided courts deliver an outcome for parties by virtue of section 23(2) of the *Judiciary Act* by generating a court order. But this expedient does not create a majority of reasons. According to 100 years of High Court jurisprudence, regardless of whether the case arose in original or appellate jurisdiction, evenly divided decisions like *Coe* create no binding authority or ratio. Thus, there is no need to argue for overruling *Coe*.[196] The only remaining potential use for *Coe* under *stare decisis* is the provision of individual judgments capable of being mined for future possibilities. Unfortunately, *Coe* was not delivered in ideal circumstances given its pre-trial procedural context, which produced limited and, at times, poor reasoning. As a result, the capacity for individual judgments of *Coe* to provide precedential guidance for future situations is slight.

193 *Perara-Cathcart* (n 94) 621–2 [73].

194 Ibid 622 [75]. While Gageler J mischaracterises the parameters of paragraphs (a) and (b), his Honour is clear the decision-making rule under both paragraphs applies to the end point of an order and not the intermediate stage of reasoning.

195 But see *Milne* (n 187). Leading a unanimous court, Barwick CJ in *Milne* (n 187) was clear the prior evenly divided case of *Clowes v Federal Commissioner of Taxation* (1954) 91 CLR 209 'forms no precedent', but that due to over 20 years of common practice, and after 'due consideration', chose to follow the statutory majority: at 533–5.

196 Thus, the criteria established for overruling in the High Court in cases such as *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 does not arise: see generally Matthew Harding and Ian Malkin, 'Overruling in the High Court of Australian in Common Law Cases' (2010) 34(2) *Melbourne University Law Review* 519.

VI CONCLUSION

This article has demonstrated that the longstanding assumption that all questions of First Nations sovereignty are non-justiciable as a matter of High Court precedent is incorrect. The central issue in *Coe* was not a substantive question about the justiciability or existence of First Nations sovereignty, but a procedural question about the viability of an amended statement of claim. To assume that this case stands for any wider proposition on First Nations sovereignty is to err in the application of the well-established rules of the doctrine of precedent.

This raises significant questions about the doctrinal stability and durability of the High Court's current position. By removing *Coe* as the basis of the High Court's current position of non-justiciability, a future full court of the High Court is well-positioned to consider this issue afresh, giving it full and proper examination. The question of whether or not to put this issue before the Court is, of course, a strategic question that can only be answered by First Nations peoples. Nevertheless, this article has taken a critical first step in clarifying this possibility by showing that, as a technical matter, the Court need not overrule any prior cases when the opportunity arises: *Coe* has no precedential authority, all other decisions directly on this point were by single justices of the High Court, and any remaining cases touched on this issue indirectly by way of commentary.

As former High Court Chief Justice Susan Kiefel observed, courts and the academy share a concern with the 'correct and coherent development of the law'.[197] This is especially pertinent given First Nations sovereignty remains a highly contested legal – and political – issue in contemporary Australia. Such political contestation was evident in the 2023 Voice referendum, which prompted wide-ranging public discussions about current relations between Aboriginal and Torres Strait Islander peoples and settler society.[198] Also, despite a lack of bipartisan support, two major events occurred in Victoria in late 2025: the first *statewide treaty* and an historic apology to Aboriginal people in Victoria.[199] A similar reminder resurfaces annually on 26 January, when the appropriateness of celebrating Australia Day on

197 Chief Justice Susan Kiefel, 'The Academy and the Courts: What Do They Mean to Each Other Today?' (2020) 44(1) *Melbourne University Law Review* 447, 448.

198 See, eg, Moreton-Robinson, 'Sovereign Subjects' (n 20). In the context of the Voice referendum, see generally Lino (n 2).

199 Having delivered a *Statewide Treaty* (n 19), the current Liberal opposition in Victoria have vowed to introduce legislation repealing this treaty if they are elected in 2026: Kate Ashton, 'Victorian Liberals to Scrap Statewide Treaty if Elected', *ABC News* (online, 14 October 2025) <www.abc.net.au/news/2025-10-14/victoria-liberal-opposition-first-peoples-treaty-scrapped/105888108>. Further, on 9 December 2025, the Victorian Labor Government delivered an historic official apology to Aboriginal people, which was supported by Greens members of Parliament but opposed by Liberal and National members: Kate Ashton et al 'Victorian Government Makes Historic Apology to Aboriginal People Following Signing of Treaty', *ABC News* (online, 9 December 2025) <https://www.abc.net.au/news/2025-12-09/government-apology-to-aboriginal-victorians-after-treaty/106116798>. Note that the apology implemented one of the key recommendations of Victoria's recent truth-telling commission: Yoorrook Justice Commission, *Truth Be Told* (Final Report, June 2025) 432.

the anniversary of a British flag being planted on Gadigal Country, proclaiming British sovereignty over the whole of Australia, is widely debated.[200]

At its core, both legal and political questions of First Nations sovereignty raise in their wake fundamental and challenging questions about the legitimacy and authority of the Australian state.[201] On the one hand, First Nations people consistently call for state legal and political recognition of the ongoing existence and practice of their sovereignty, which may or may not challenge existing sovereign arrangements.[202] On the other hand, there is a prevailing legal and political assumption that questions of sovereignty are off the table, which reinforces the status quo as one excluding First Nations sovereignty.[203] With political attempts to reconcile these divergent positions largely retreating post-referendum, this article has explored one legal possibility that might lie before the High Court.

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200 See, eg, Stan Grant, *Australia Day* (HarperCollins, 2019).

201 See generally Burns (n 5); Aileen Moreton-Robinson, 'Incommensurable Sovereignties: Indigenous Ontology Matters' in Brendan Hokowhitu et al (eds), *Routledge Handbook of Critical Indigenous Studies* (Taylor & Francis, 2020) 257 <https://doi.org/10.4324/9780429440229-23>. See also Sarouche Razi and Amy Hamilton, 'Skeletons in the Cupboard: Reading Settler Anxiety in *Mabo* and *Love*' (2023) 32(4) *Griffith Law Review* 410 <https://doi.org/10.1080/10383441.2024.2342618>.

202 See, eg, 'Uluru Statement' (n 18). See also above n 1.

203 Politically, after months of post-referendum silence, the federal Labor Government in August 2024 reduced its support for the 'Uluru Statement' (n 18): see, eg, Karen Middleton, 'Albanese Endorses "Principle" of Makarrata but Stops Short of Backing Truth and Justice Commission', *The Guardian* (online, 4 August 2024) <https://www.theguardian.com/australia-news/article/2024/aug/04/albanese-endorses-principle-of-makarrata-but-stops-short-of-backing-truth-and-justice-commission>. This has also occurred at a state level: see, eg, Queensland, *Parliamentary Debates*, Legislative Assembly, 26 October 2023, 3331 (Amy MacMahon); New South Wales, *Parliamentary Debates*, Legislative Council, 18 October 2023, 8675–6 (Penny Sharpe). Cf *Statewide Treaty* (n 19). In Victoria, while the treaty progress has progressed, this has not been without political resistance: see above n 199.